United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-7075

B

P/S

United States Court of Appeals

For the Second Circuit

Docket No. 76-7075

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs-Appellees,

against

WALTER W. BREGMAN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

WEIL, GUTTMAN & DAVIS
(formerly Weil, Lee & Bergin)
60 East 42nd Street
New York, New York 10017
(212) 687-8573
Attorneys for Defendant-Appellant

BISCO, WINKLER & HIGGISTON
645 Madison Avenue
New York, New York 10022
(212) 832-2600
Attorneys for Plaintiffs-Appellees

UNITED STATES COURT OF APPEALS
FILED
APR 16 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	Page
Docket Entries	i-iii
Memorandum Opinion and Order of the District Court for the Southern District of New York entered February 17, 1976	1a-10a
Complaint	11a-24a
Answer, Counterclaim, Jury Demand	25a-28a
Deposition of Donald W. Randall	29a-50a
Plaintiffs' Exhibits 23A, 23B, 23C - three ledger sheets kept by Roselou Flanagan reflecting three Bregman purchases of shares	51a-53a
Notice of Motion to Disqualify Counsel for Defendant with attached Affidavit of Leonard G. Bisco dated December 31, 1974	54a-69a
Affidavit of Donald W. Randall dated January 22, 1975	70a-81a
Defendant's Memorandum in Opposition to Motion to Disqualify with attachments	82a-148a
Affidavit of Gilbert H. Weil dated May 14, 1975. .	149a-171a
Reply to Counterclaim	172a-173a
Affidavit of Leonard G. Bisco dated October 30, 1974	174a-186a

(cont'd)

	Page
Affidavit of Leonard G. Bisco dated May 16, 1975	187a-190a
Report of Magistrate Raby	191a-196a
Additional pages of transcript of Deposition of Donald W. Randall	197a-285a
Deposition of Walter W. Bregman	286a-293a

Docket Entries

Relevant Docket Entries

Date	Proceedings
Feb. 19-74	Filed petition for removal from Supreme Court State & County of New York.
May 16-74	Filed stip & order- that the two actions above are consolidated in to a new action entitled: "The NCK Organization Ltd. and William E. Greene, Jr., Pltffs., against Walter W. Bregman, Deft." -74 Civ. 776 (CBM)- the complaint submitted by the pltffs in the said new action is accepted by attys, for the deft. as indicated- and the action above entitled Walter W. Bregman -vs- William E. Greene, Jr. 74 Civ. 301(CBM) is discontinued without costs. So ordered- MOTLEY, J.
May 22-74	Filed complaint.
Aug. 20-74	Filed deft's ANSWER and counterclaim.
Sept.10-74	Filed pltff's reply to counterclaim.
Oct. 4-74	Filed deft's notice of motion for an order for summary judgment. Ret. 10-17-74.
Oct. 4-74	Filed def't memorandum in support of motion for summary judgment.
Nov. 1-74	Filed pltffs' affdvt. of Leonard G. Bisco and notice of motion for an order to compel answers to questions on deposition of Donald W. Randall. Ret. 11-7-74.
Nov. 6-74	Filed deposition of Norman B. Norman taken 7-2, 9-74.
Nov. 19-74	Filed pltff's exhibits. Deposition of Walter W. Bregman May 24, 1974.
Nov. 19-74	Filed deft's exhibits. Deposition of deft Walter W. Bregman May 24, 1974.
Jan. 3-75	Filed pltffs' affdvt. of Leonard G. Bisco and notice of motion for an order to disqualify counsel for deft. Ret. 1-15-75.

(Cont'd.)

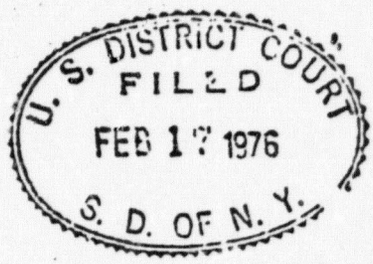
Date	Proceedings
Jan. 3-75	Filed pltffs' memorandum of law in support of motion to disqualify deft's counsel.
Jan. 24-75	Filed deft's memorandum in opposition to motion to disqualify.
Jan. 24-75	Filed deft's affdvt. of Donald W. Randall in opposition to pltffs' motion to disqualify.
Jan. 24-75	Filed deft's affdvt. of Gilbert H. Weil.
Feb. 3-75	Filed pltffs' reply memorandum on motion to disqualify counsel.
Mar. 11-75	Filed deft's objections to the report of United States Magistrate, dated 3-4-75.
Mar. 14-75	Filed pltffs' objections to the Report of Magistrate Raby.
Mar. 20-75	Filed deft's reply to pltffs' objections to the Report of Magistrate Raby.
Mar. 24-75	Filed pltffs' Affidavit & Notice of Motion for summary judgment, for an order in favor of the pltffs and against deft for the relief demanded in the complaint, etc, as indicated, rtble on 3-27-75.
Mar. 24-75	Filed pltffs' memorandum of law on the summary judgment motions.
Mar. 26-75	Filed deft's statement pursuant to Local Rule 9 (g).
Mar. 26-75	Filed deft's memorandum in opposition to motion for summary judgment and in reply to pltffs' papers in opposition to deft's motion for summary judgment.
Mar. 27-75	Filed pltffs' reply memorandum on the summary judgment motions.
May 14-75	Filed deft's second affdvt. of Gilbert H. Weil in opposition to pltffs' motion to disqualify my firm from continuing its representation of Mr. Bregman.

(Cont'd.)

Date	Proceedings
May 20-75	Filed deft's supplemental memorandum in opposition to motion to disqualify
June 2-75	Filed Report of Magistrate Raby.
Feb. 17-76	Filed Memorandum - Opinion #43896 and Order -- for the reasons stated, both pltffs' and deft's motions for summary judgment are denied, and pltffs' motion for the disqualification of Donald W. Randall, Esq. and the Weil, Lee & Bergin, Esqs. firm is granted. So ordered - Motley, J. (m/h)
Feb. 19-76	Filed order - that the parties to this action adhere to the schedule of pretrial procedures as indicated. So ordered - Motley, J. (m/h)
Feb. 23-76	Filed deposition of Donald W. Randall taken on 10-16-74.
Feb. 23-76	Filed deposition of Donald W. Randall taken on 11-21-74.
Feb. 23-76	Filed continued deposition of Donald W. Randall taken on 12-12-74.
Feb. 25-76	Filed deft's notice of appeal to USCA from the order entered on 02-17-76 granting pltffs' motion to disqualify deft's attorneys. Copy mailed to: Bisco, Winkler & Higgiston. Ent. 2-26-76.

Memorandum Opinion and Order of the District Court for the Southern District of New York entered February 17, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



#143896

THE NCK Organization Ltd., and WILLIAM E. GREENE, Jr.,

Plaintiffs,

-against-

74 CIV. 776

WALTER W. BREGMAN,

Defendant.

APPEARANCES

BISCO, WINKLER & HIGGISTON
By: Leonard G. Bisco
645 Madison Avenue
New York, New York 10022

Attorneys for Plaintiffs

WEIL, LEE & BERGIN
By: Gilbert H. Weil
60 East 42nd Street
New York, New York 10017

Attorneys for Defendant

CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION AND ORDER

Three motions are presently outstanding in this case. Plaintiffs and defendant have made cross-motions for summary judgment and, in addition, on January 3, 1975, plaintiffs moved for an order to disqualify as attorneys for the defendant in this action Donald W. Randall, Esq., and the firm of Weil, Lee and Bergin, Esqs. This last motion was referred for review to United States Magistrate Harold J. Raby, who, in a report dated March 4, 1975, recommended that a disposition of the disqualification motion be delayed until the summary judgment motions were decided. Accordingly, at this time the court denies both plaintiffs' and defendant's motions for summary judgment and grants plaintiffs' motion of disqualification as to both Mr. Randall and the firm of Weil, Lee and Bergin.

The Summary Judgment Motions

The controversy in this matter involves defendant Bregman's contract rights against plaintiffs. Bregman contends that under a written contract entered into between the corporate

plaintiff (ORG) and plaintiff Greene on August 31, 1972, he as third-party beneficiary enjoyed an option to purchase from Greene 5,000 shares of stock of the corporate plaintiff at $5.47 per share. Bregman further asserts that written contracts of June 17, 1970 and October 25, 1967 between him and ORG's corporate predecessor obligated ORG to repurchase those same shares from him at their book value.

Bregman, by certified letter on November 5, 1973 attempted to exercise his alleged option and purchase the 5,000 shares from Greene who, by letters dated November 29, 1973 and December 7, 1973, refused to transfer. He now asserts that this failure to honor the option prevented him from re-selling the shares to ORG at their book value as of December 31, 1973, an amount more than double what would have been his purchase price under the option.

The ultimate relief sought by plaintiffs in this case is a judgment 1) declaring the respective rights and obligations of the parties in respect to the transactions described above; 2) decreeing that defendant is not entitled to exercise the Greene optionn for the purchase of 5,000 shares of Class B stock of ORG after the termination of his employment by NCK, a wholly owned subsidiary of ORG; and 3) decreeing that in any case, unless defendant agrees that said stock may be purchased

by ORG at the same price paid by defendant to plaintiff Greene, he is not entitled to exercise the Greene option or is bound to resell said shares to ORG at the same purchase price.

The court finds itself unable to grant summary judgment on the motion of either side in this case because of unresolved issues of material facts. While the contracts at issue in the case seem clear on their face, of particular concern to this court is plaintiffs' claim that defendant, as senior vice president and director of ORG and president and director of its wholly owned subsidiary, NCK, owed plaintiff corporation a fiduciary duty which he failed to exercise in allowing himself to be named as a beneficiary of the ORG-Greene contract without notifying the corporation of the existence of the June 17, 1970 contract, which apparently allowed him to sell whatever shares he obtained in ORG ack to the company at book value regardless of the length of time he had held them. This was in contradistinction to the arrangements as to all other executives in the company, who were required to hold such securities at least three years during which they were employed by the company before acquiring the right of book value redemption.

The New York Court of Appeals, in an opinion by Justice Cardozo, noted that a "constant duty rests on a trustee to seek no harsh advantage to the detriment of his trust, but rather to protest and renounce if through the blindness of those who treat with him he gains what is unfair." Globe Woolen Co. v. Utica Gas & Electric Co., 224 N.Y. 483, 492 (1918). In that case, a contract made by defendant corporation of which a Mr. Maynard was a director in common with the plaintiff corporation was held subject to annulment because Mr. Maynard, though not voting and though he kept "silent," knew or should have known that it was an unfair contract. The court noted that a fiduciary in such an instance "takes the risk of an enforced surrender of his bargain if it turns out to be improvident." (p. 490).

If plaintiffs in this case are to succeed on such a theory of law, the court finds that there remains a considerable number of fact questions to be resolved. These include: 1) the question of whether or not the corporation and its representatives were indeed unaware of the 1970 Bregman employment contract at the time the Green option contract was being negotiated; 2) the question of defendant's knowledge of such corporation ignorance and, indeed, of the existence of the Green option negoitations before their consumation;

and 3) a showing that defendant's failure to disclose affected ORG's decision to enter into the option contract.

Because of the existence of such unsettled questions of material fact, the court must deny both plaintiffs' and defendant's motions for summary judgment.

The Motion to Disqualify

The basis for this motion to disqualify as attorneys for defendant in this action Donald W. Randall and the firm of Weil, Lee and Bergin rests on the fact that Mr. Randall, following the termination of his services as house counsel to plaintiff corporation, became an attorney for defendant Bregman. Furthermore, in that capacity, he conferred concerning the merits of this litigation with the attorneys of record for defendant, Weil, Lee and Bergin.

Canon 4 of the Code of Professional Responsibility states specifically that "[c]are should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure." In interpreting the canon, the Second Circuit has noted that "the court need not,

indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment which might be used to the client's disadvantage." Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973). This is consistent with Canon 9 which requires that a lawyer avoid even the "appearance of impropriety."

The district court bears the responsibility for the supervision of members of its bar, and while decisions regarding the dispatch of this duty are discretionary, any doubts which arise in considering a disqualification motion must be resolved in favor of disqualification. Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975). Applying such criteria and having reviewed the facts in this case, the court can come to no other conclusion than that Randall and the Weil firm must be disqualified.

Randall was in the employ of ORG and NCK from September 1, 1967 until July 15, 1973. Throughout his employment there, he served as house counsel to NCK and held the title of general counsel and vice president. Among the duties which he fulfilled in this position was the preparation of the 1970 agreement which gave defendant Bregman the right to sell all shares of company stock back to the company at book value.

He also was involved in the transactions leading up to the ORG-Greene options contract which is also at issue in the instant action.

Despite this intimate involvement with the affairs of ORG and NCK, immediately upon termination of his employment with those corporations on July 15, 1973, he undertook to represent defendant Bregman against NCK in the very matters on which he had formerly worked for NCK. During the course of such representation, Randall consulted with the Weil firm, which was eventually to become counsel of record in the present case, and he consulted with both the Weil firm and defendant Bregman on their defense and counterclaim in this case.

As the court noted in the portion of this opinion dealing with the summary judgment motions, there remain to be considered in this case substantial questions of fact as to the state of mind of both plaintiffs and defendant. Of particular relevance are their states of mind during particular transactions, at which time Randall was serving as house counsel to NCK. Given this posture of the case, Randall's representation of defendant flies in the face of Canons 4 and 9, and he must be disqualified from further participation in this matter.

This same sanction of disqualification must be applied to the Wiel firm. While that firm at no time actually represented either of the plaintiffs to this action, their admitted consultation with Randall regarding this case places them in the same position as if they had. The situation here is very similar to that existing in the case of Hull v. Celanese Corp., 513 F.2d 568 (1975), where a law firm was disqualified for taking on as a plaintiff-client in a sex discrimination suit an attorney who as house counsel to the corporation being sued had originally worked on the defense. The Second Circuit noted in that case that the firm in question would also have been disqualified had the former house counsel joined the firm as an assistant counsel in the particular case rather than as a client. 513 F.2d at 572. While in the instant case, Randall had not participated for NCK in the actual litigation now at issue, his work on the transactions underlying such litigation make his present involvement equally culpable. Nor can he now represent to the court that he was not an "assistant counsel" in this particular case, since the evidence shows that, whatever title he might choose for himself, his activities in behalf of defendant in conjunction with the Weil firm were sufficient to disqualify both him and said firm from further participation in this action.

Accordingly, both plaintiffs' and defendant's motions for summary judgment are denied, and plaintiffs' motion for the disqualification of Randall and the Weil firm is granted.

Dated: New York, New York

February 17, 1976

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

Complaint

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD., and WILLIAM E. GREENE, JR., Plaintiffs	COMPLAINT
-against-	
WALTER W. BREGMAN, Defendant.	

Plaintiffs complaining of defendant by Bisco, Winkler & Higgiston, their attorneys, allege as follows:

1. Plaintiff William E. Greene, Jr., is a citizen of the United States, residing at 3574 Moorings Way, Coconut Grove, Florida.

2. Defendant is a citizen of the United States, residing at Brighton Apartments, 1229 Brighton, No. 250, Modesto, California 95355.

3. Plaintiff, the NCK Organization Ltd. (Organization) is a New York corporation. Prior to November 2, 1970 plaintiff was known as Norman, Craig & Kummel, Inc. and duly changed its name to Organization on November 2, 1970. The principal place of business of Organization is at 919 Third Avenue, New York, N.Y. 10022.

4. Norman, Craig & Kummel Inc. (NCK) is a New York corporation. Prior to November 2, 1970 NCK was known as NCK Group, Ltd. and duly changed its name to NCK on November 2, 1970. The principal place of business of NCK is at 919 Third Avenue, New York, N.Y. 10022.

5. The amount in controversy is in excess of $10,000, exclusive of interest and costs. Jurisdiction is based on 28 U.S.C. §1332 and 28 U.S.C. §2201.

6. Until January 2, 1974 defendant was the president and chief operating officer of NCK, having

been elected to the office of president on June 22, 1971.

7. Defendant is the owner of 30,000 shares of Class B stock of Organization having acquired same on the following dates and at the following prices:

October 25, 1967	10,000 shs.	$47,000.
February 13, 1968	10,000 shs.	$57,900.
March 12, 1969	10,000 shs.	$69,800.

The first 10,000 shares were purchased from NCK. The second 10,000 shares were purchased from Norman B. Norman. The third purchase was of 6,000 shares from Norman B.Norman and 4,000 shares from B. David Kaplan. All of said shares were Class A shares of stock of NCK, later converted by its board of directors into Class B shares of Organization.

8. On October 25, 1967, at the time of the purchase of the first 10,000 shares, defendant executed and delivered to NCK his Standard Stockholders' Agreement relating to the purchase of his said shares. On February 6, 1968, prior to the purchase of the second 20,000 shares, defendant executed and delivered to NCK in the same form, an agreement relating to the purchase of the said 20,000 shares in 1968 and 1969. A copy of the latter agreement is annexed hereto, marked Exhibit A and made part hereof. The said agreement contains a provision in paragraph 10 thereof reading:

> "This Stockholders' Agreement shall supersede any other form of Stockholders' Agreement heretofore executed by the parties hereto, and shall be applicable to all shares of the Corporation of all classes now held or hereafter acquired by the Stockholder."

9. On June 17, 1970 NCK and defendant entered into an agreement with regard to his employment in New York, a copy of which is annexed hereto, marked Exhibit B and made part hereof.

10. On or about August 31, 1972, B. David Kaplan, then one of the two major shareholders of Organization, sold all of his holdings of shares of Class B stock at the price of $5.47 per share. Among the purchasers of said shares of said stock were Thomas H. Myers of 4,000 shares, John P. Beresford of 2,000 shares and Edward W. Roncarelli of 7,313 shares, all employees of Organization or NCK, and plaintiff William E. Greene, Jr. of 73,125 shares. William A. Maas was also the purchaser of 4,500 of said shares but his employment was terminated on October 31, 1972 and he sold back the said shares to Organization at the purchase price thereof. Defendant was offered the opportunity to buy Kaplan shares but refused same. By arrangements made between plaintiff Greene and Norman B. Norman, the president of Organization, options to purchase said shares were given by plaintiff Greene to the said individuals, Maas and defendant to the extent of 5,000 shares each. The purchase price in each such case was the same until August 31, 1975, viz., $5.47 per share.

11. On September 3, 1971 and December 15, 1972 defendant and Organization entered into written agreements subordinating the rights of defendant to require the repurchase of said shares by Organization and amending the Stockholders' Agreement in that respect until all obligations first to Chemical Bank and then to The Chase Manhattan Bank N.A. were paid. Each of said agreements referred to the Stockholders' Agreements between Organization and defendant as being the agreements of October 25, 1967 and February 6, 1968 and neither made any mention of the June 17, 1970 agreement.

12. Each of the individuals, Myers, Beresford, Roncarelli and Maas, signed an agreement with Organization at the time of the purchase of the Kaplan shares in which the individual agreed that if his employment terminated by discharge in less than 36 months from the date of payment for said shares, the said shares should be sold to Organization at a price which would be the lower of

(a) the purchase price plus any increase in book value accruing between January 1, 1973 and the December 31st next preceding the date on which his employment was terminated, or

(b) the book value thereof at the December 31st next preceding the date on which his employment terminated.

13. At the same time an agreement was prepared, for use in case any of the said individuals or defendant sought to exercise his option to buy shares from plaintiff Greene, which provided that the selling price payable by Organization for such shares, if the employment was terminated within 36 months from the date of payment for said shares, should be the lower of

(a) the purchase price thereof, or

(b) the book value thereof at the December 31st next preceding the date of termination of his employment.

14. Defendant did not sign the agreement described in paragraph 12 hereof as he was not a purchaser of Kaplan shares. Neither defendant nor the said individuals signed the agreement described in paragraph 13 hereof as that agreement was not to be used except if defendant, or any

of the said individuals, sought to exercise the Greene option but, on information and belief, the said individuals and the defendant knew at all times of the said agreement and that the signature of same was to be one of the conditions to the exercise of the Greene options.

15. The price to be paid to plaintiff Greene on the exercise of said options was $5.47 per share. The book value of each Organization share as of December 31, 1972 was $11.19 per share. As of December 31, 1973 it is estimated to be approximately $12.75 per share. On October 2, 1973 NCK terminated defendant's employment effective three months from date. On November 5, 1973 defendant served notice on plaintiff Greene that he elected to exercise his option to buy 5,000 shares of Organization from Greene at the price of $5.47 per share to be effected on or bef ecember 14, 1973.

Plaintiff Greene refused to accept the exercise of said option unless it was accompanied by the signature and delivery by defendant of the agreement described in paragraph 13 hereof. Defendant has insisted upon the exercise of his said option without signing such agreement and proposes to transfer the 5,000 shares bought at the price of $5.47 per share to Organization against the payment of approximately $12.75 per share, the estimated book value of said shares as of December 31, 1973. Defendant has instituted suit in this Court against plaintiff Greene for his lost profit estimated at approximately $45,000.

17. There is a controversy or dispute between the parties. Defendant claims that he is entitled to exercise the Greene option and to immediately resell the shares purchased to Organization at the December 31, 1973 book value estimated at $12.75 per share for an immediate

profit estimated to be approximately $45,000. Plaintiffs claim that defendant is not entitled to exercise his Greene option and to compel Organization to buy at current book value after his employment has terminated; and that defendant is not entitled to exercise his Greene option unless he first signs the agreement described in paragraph 13 hereof.

18. Plaintiffs have no adequate remedy at law.

WHEREFORE plaintiffs demand judgment against the defendant (1) declaring the respective rights and obligations of the parties hereto in respect to the transactions hereinabove described; (2) decreeing that defendant is not entitled to exercise the Greene option for the purchase of 5,000 shares of Class B stock of Organization after the termination of his employment by NCK; (3) decreeing that in any case, unless defendant agrees that said stock may be purchased by Organization at the same price paid by defendant to plaintiff Greene, he is not entitled to exercise the Greene option or is bound to resell said shares to Organization at the same purchase price; and (4) granting plaintiffs such other and further relief against the defendant as may be proper in the circumstances, together with the costs and disbursements of this action.

Dated: New York, N.Y.
April 19, 1974

BISCO, WINKLER & HIGGISTON

BY _____
Leonard G. Bisco
a member of the firm
Attorneys for Plaintiffs
Office and P.O. Address:
645 Madison Avenue
New York, N.Y. 10022
Telephone: (212) 832-2600

Stockholders' Agreement

NORMAN, CRAIG & KUMMEL INC.
468 Madison Avenue, New York, N. Y. 10022

AGREEMENT made this 6th day of February, 19 68

between WALTER W. BRENNAN, residing at LONDON, ENGLAND hereinafter called "Stockholder," and NORMAN, CRAIG & KUMMEL INC., a New York corporation, having its principal office at 488 Madison Avenue, in the City, County and State of New York, hereinafter called "Corporation."

1. Stockholder agrees that he will not sell, transfer, assign, mortgage, pledge, hypothecate or otherwise transfer any shares of stock of Corporation, now or hereafter held or owned by him, without first offering the same to Corporation, at the price set forth in paragraph 3 hereof. Corporation shall have a period of thirty (30) days after receipt by it of written notice setting forth such offer within which to notify the offering Stockholder of its acceptance of such offer. Such acceptance to Stockholder shall also specify the closing date, upon which date payment will be made as set forth in paragraph 4 against the delivery of the certificates for such shares, in proper form for transfer, with transfer stamps affixed at the expense of the seller.

2. If at any time Stockholder shall cease to be in the employ of Corporation, as an officer or otherwise, or shall die, Stockholder, for himself and his legal representatives, agrees to sell to Corporation, and Corporation agrees to buy all shares of stock of Corporation then owned by Stockholder, at the price set forth in paragraph 3 hereof.

3. If within 36 months from the date of the subscription by Stockholder for any shares of Corporation held by Stockholder (i) Stockholder shall make an offer of shares to Corporation, as provided in paragraph 1, or (ii) cease to be in the employ of Corporation for a reason other than death, or the illness of Stockholder which prevents Stockholder from working at his normal occupation, then, in either such event, the selling price of such shares shall be lower of

(a) the subscription price thereof (or the amount paid on account of the subscription price, if the subscription price has not been paid in full); or

(b) a base price computed by taking the book value of such shares at December 31st prior to the date of the offer made as provided in paragraph 1, or December 31st prior to the date of the termination of employment to which there shall be added, or deducted, the increase or decrease in book value for the full calendar quarters of the current year, if any, which expired prior to the time when the Stockholder made his offer, or terminated his employment. For the purpose of determining such increase or decrease in book value during the current year, the book value as at the following December 31st shall be determined, and it shall be assumed that any increase or decrease accrued ratably over the four quarters of the year.

If the Stockholder (i) should at any time die, or (ii) should the Stockholder within 36 months from the date of the subscription for any shares held by Stockholder cease to be in the employ of Corporation by reason of the illness of Stockholder which prevents Stockholder from working at his normal occupation, or (iii) should the Stockholder more than 36 months from the date of the subscription for shares held by Stockholder either make an offer as provided in paragraph 1 or cease to be in the employ of Corporation for

any reason the purchase price of such shares shall be determined as follows: (aa) the base price shall be the book value of such shares at December 31st prior to the date of the offer made as provided in paragraph 1, or December 31st prior to the date of the termination of employment or death, as the case may be; (bb) there shall be added thereto, or deducted therefrom, the increase or decrease in book value for the full calendar quarters of the current year, if any, which expired prior to the time when the Stockholder made his offer, or terminated his employment, or died. For the purpose of determining any such increase or decrease in book value during the current year, the book value as at the following December 31st shall be determined, and it shall be assumed that any increase or decrease accrued ratably over the four quarters of the year. For the purpose of this agreement, book value shall be determined by the certified public accountants regularly employed by Corporation for the audit of its books of account, in accordance with the usual practices adopted by said accountants in closing the books of the Corporation as at the end of its fiscal year, with appropriate adjustment to reflect subscriptions receivable, and shares to be issued in pursuance of such subscriptions. No value shall be included for goodwill.

4. In the case of a sale as provided in paragraph 2, the closing of the sale shall be held at a time designated by notice of Stockholder, or his legal representative, giving not less than five (5) days nor more than fifteen (15) days after the date of termination of employment or death, as the case may be. If Stockholder or his legal representative shall fail within said fifteen (15) day period to fix a closing date, Corporation may by notice fix a closing date. The closing date shall be not earlier than five (5) days nor later than fifteen (15) days from the date of the notice fixing the same.

5. The closing shall be held at the principal office of Corporation at 11:00 o'clock in the morning. The purchase price shall be paid at the closing in exchange for the certificate or certificates of stock, in proper form for transfer, with transfer stamps affixed at the expense of the seller, as follows:

(a) If the purchase price is $20,000 or less, the purchase price shall be paid in cash or by good certified check at the closing.

(b) If the purchase price is more than $20,000, at the option of Corporation, in lieu of paying the same as provided in (a) above, a down payment of $20,000 shall be made at the closing, and the balance shall be paid in equal annual installments of $20,000 each (except the last, which shall be for the balance due), the first installment to be due one year after closing, and the remainder annually thereafter, with interest at the rate of four per cent (4%) per annum, from the closing date, with privilege to the Corporation to prepay the principal at any time.

(c) If the purchase price requires a future adjustment, as provided in paragraph 3(bb), then for the purpose of closing, the purchase price shall be deemed to be the purchase price as determined by the preceding December 31st book value. Any additional purchase price shall be paid by the Corporation to the Stockholder after completion of the next December 31st audit, and any overpayment refunded by the Stockholder forthwith upon receipt of notice to Stockholder by Corporation of the amount thereof, after completion of said audit.

6. In the event that at a time when Corporation is required to buy shares of stock of Corporation it is unable to do so because of lack of sufficient surplus, the Corporation and its directors agree to take such action as may be

necessary or appropriate by way of reduction of capital or otherwise to create sufficient surplus, and the obligation of Corporation to purchase said shares of stock shall continue until sufficient surplus is available and said shares have been purchased as provided in this agreement.

7. Notwithstanding anything contained in this agreement, Corporation does hereby expressly consent to the transfer by Stockholder of all or any part of the shares of Corporation owned by the Stockholder to his wife, or to any adult child of the Stockholder, provided, however, that prior to or simultaneously with such transfer, the transferee enters into an agreement, satisfactory to counsel for Corporation, agreeing to all provisions of this agreement with the same force and effect as if the stock continued to be held by Stockholder.

8. Each certificate for the shares of Corporation held by Stockholder shall have inscribed upon the face or back thereof a notice substantially in the following form:

> "The stock evidenced by this certificate is subject to the terms of a certain agreement between the owner hereof and Norman, Craig & Kummel Inc., which agreement, among other things, restricts the transfer of this certificate. A copy of said a[illegible]ment is on file with Norman, Craig & Kummel Inc. and reference thereto may be made by any interested party."

9. All offers or notices to be given hereunder shall be in writing. If intended for Stockholder the same shall be delivered to Stockholder personally, or sent to Stockholder by registered or certified mail, return receipt requested, at the address of Stockholder as shown on the payroll records of Corporation. If intended for Corporation any offers or notices shall be delivered personally to the Secretary or Treasurer, or sent by registered or certified mail, return receipt requested, marked for the attention of the Secretary or Treasurer, at the principal office of Corporation.

10. This agreement shall be interpreted in accordance with the laws of New York, and shall be binding upon and inure to the benefit of the respective legal representatives, successors and assigns of the parties. This Stockholders' Agreement shall supersede any other form of Stockholders' Agreement heretofore executed by the parties hereto, and shall be applicable to all shares of the Corporation of all classes now held or hereafter acquired by the Stockholder.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the date hereinabove first set forth.

_____ L. S.
WALTER W. BREDMAN Stockholder

NORMAN, CRAIG & KUMMEL INC.

By _____
Norman B. Norman

September, 1958 A

EXHIBIT A

June 17, 1970

Mr. Walter W. Dreyman
Norman, Craig & Kummel Europe S.A.
Greater London House
Hampstead Road
London N.W. 1, England

Dear Wally:

This letter will confirm our understanding with respect to various matters in connection with your transfer from England to the New York office of Norman, Craig & Kummel Inc. ("NCK").

1. You will continue to hold the office of Executive Vice President of NCK and will be given the additional title of Chief Operating Officer, with the attendant duties and responsibilities. It is understood that your election to the office of President of NCK will be proposed to the Board of Directors within 24 months from the date you take up your new position in New York.

2. Your salary will be increased to $75,000 per annum effective on the date on which you begin work in New York in your new position.

3. In addition to your salary, you will be entitled to the following benefits and allowances:

   a) You will participate in the NCK Supplementary Medical Reimbursement Plan and will be entitled to reimbursement of medical expenses of up to $2,500 a year, in accordance with the provisions of the Plan. This amount will be increased if and when circumstances require.

b) You will continue to participate in the Profit-Sharing and Group Insurance Plans of NCK, on the same basis as other executive employees in the New York office.

c) You will be included in the group of executives who are eligible for executive bonuses, which are paid in years when profits are deemed sufficient. The amount of any such bonus will be determined by the Executive Committee of the Board of Directors of NCK.

d) You will receive other benefits and allowances as agreed from time to time between you and NCK.

4. You will be reimbursed, in accordance with the applicable NCK procedures, for all reasonable and necessary business expenses incurred by you in the performance of your duties for NCK.

5. NCK will pay the reasonable cost of packing and shipping your personal and household effects from England to New York. Estimates of the cost of such packing and shipping shall be submitted in advance to NCK. During the period of your relocation from England to the United States, NCK will reimburse the living expenses of you and your family, up to $50 per diem per person, for a period of not more than three months.

6. To facilitate your purchase of a residence in the New York metropolitan area, NCK will loan you up to $30,000, to be secured by a first or second mortgage on the real property purchased by you. Such loan will be repayable in 120 equal monthly installments of principal and interest (at the rate of 6% per annum), subject to acceleration in the event of the termination of your employment with NCK for any reason.

7. NCK may terminate your employment by giving you notice in writing at any time specifying a termination date not less than three months after the date on which such notice is given. Your salary, at the then current rate, will be continued until the termination date. Payments equal in amount to your then current salary payments, after all deductions required by law or authorized by you, will be continued for a period of not more than six months after the termination date, provided that such payments shall cease immediately without notice upon your acceptance of any other employment.

8. If your employment is terminated by NCK, all shares of the capital stock of NCK then owned by you will be repurchased in accordance with the second part of paragraph 3 (beginning "If the Stockholder (i) should at any time die...") of the Stockholders' Agreement dated October 25, 1967 between you and NCK, without regard to the length of time you have held such shares. Your Stockholders' Agreement is hereby amended accordingly.

9. If your employment with NCK is terminated for any reason, either by you or by NCK, payment for the shares of capital stock of NCK repurchased from you will be made in five equal annual installments. The first such installment will be paid at the closing and the remaining installments at yearly intervals thereafter, with interest from the closing date at a rate equal to the average prime rate charged during the period by the principal New York banker of NCK. Paragraph 5 of the Stockholders' Agreement dated October 25, 1967 between you and NCK is hereby amended accordingly.

If the foregoing correctly sets forth our understanding, please indicate your agreement by signing the enclosed copy of this letter and returning it to me.

Sincerely yours,

B. David Kaplan

Accepted and agreed to.

Walter W. Bregman

BDK:ymd

EXHIBIT 5

Answer, Counterclaim, Jury Demand

Filed
U.S. District Court
Aug 30 4:41 PM
SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,
Plaintiffs,
- against -
WALTER W. BREGMAN,
Defendant

ANSWER
COUNTERCLAIM 74CIV776(CBM)
JURY DEMAND

Defendant answers the complaint herein by his attorneys, Weil, Lee & Bergin, as follows:

1. Admits the allegations in paragraphs 1, 3, 5, 6, 7, 8, 9 and 11.

2. Denies each and every allegation in paragraph 10.

3. Denies knowledge or information sufficient to form a belief as to any allegation contained in paragraphs 12 and 13.

4. Admits that defendant is a citizen of the United States, residing at 706 Crawford Avenue, Modesto, California 95350; and except as thus admitted denies each and every allegation in paragraph 2.

5. Alleges that NCK is wholly owned by Organization; and subject to such addition admits the allegations in paragraph 4.

6. Admits that on or about August 30, 1972, B. David Kaplan, then one of the two major shareholders of

Organization, sold all of his holdings of shares of Class B stock; and that plaintiff William E. Greene, Jr. purchased 73,125 shares thereof; and that the employment of William A. Maas was terminated on or about October 31, 1972; and that defendant was offered the opportunity to buy some of the Kaplan shares but refused same; and that by written contract effective August 31, 1972 between the plaintiffs' options to purchase 5,000 shares each of Organization stock purchased by Greene were given to certain individuals, including defendant, at $5.47 per share, said written contract speaking for itself with respect to the details of said options; and except as thus admitted denies knowledge or information sufficient to form a belief as to any remaining allegation in paragraph 10.

7. Admits that defendant did not sign any agreements such as described in paragraph 12 of the complaint but denies that it was for the reason that he was not a purchaser of Kaplan shares; and further denies that defendant knew of any said agreement or that the signature of same was to be one of the conditions to the exercise of the Greene options; and further denies knowledge or information sufficient to form a belief as to any remaining allegation in paragraph 14.

8. Admits the allegations contained in paragraphs 15, 16 and 17 except denies knowledge or information sufficient to form a belief as to the estimated values set forth therein.

AS A FIRST DEFENSE:

9. The complaint fails to state a claim against defendant upon which relief can be granted.

AS A SECOND DEFENSE:

10. The within action is not maintainable under the laws of the State of New York (N.Y. Civil Practice Law and Rules §3001), nor enforceable in the courts of that State, from which it was removed.

COUNTERCLAIM:

11. By virtue of the contracts referred to in paragraphs 1 and 6 above defendant was entitled, as referred to in paragraph 7 above, to purchase 5,000 shares of Organization stock from plaintiff Greene at $5.47 per share, on or before December 14, 1973, and to have them repurchased by plaintiff Organization, in accordance with the terms of the contracts of October 25, 1967 and of June 17, 1970 referred to in paragraph 1 above, at the book value of said shares as of December 31, 1973, including interest on unpaid installments of such purchase price at a rate equal to the average prime rate charged during the period by the principal New York banker of NCK.

12. Plaintiffs, acting in concert and conspiratorially, have breached their contracts with defendant through plaintiff Greene's refusal to sell any shares of Organization stock to defendant, as referred to in paragraph 7 above, and through plaintiff Organization's refusal to repurchase any of said shares of stock from defendant other than at $5.47 per share, as referred to in paragraph 7 above.

13. By virtue of their said breaches of contract plaintiffs have damaged defendant in an amount in excess of $50,000.

BEST COPY AVAILABLE

WHEREFORE, defendant demands judgment against the plaintiffs as follows:

1. Declaring that plaintiff Greene is obligated to sell 5,000 shares of stock in Organization to defendant at $5.47 a share; and that plaintiff Organization is obligated to purchase said 5,000 shares of stock from defendant at the book value thereof as of December 31, 1973, and to pay to defendant interest upon the unpaid portions of said purchase price commencing as of January 1, 1974 at a rate equal to the average prime rate charged during the period of non-payment by the principal New York banker of NCK; and

2. Awarding defendant an amount equal to the difference between $27,350 and the book value of 5,000 shares of Organization stock as of December 31, 1973, plus interest at a rate equal to the average prime rate charged by the principal New York banker of NCK during the period between January 1, 1974 and the time of satisfaction of such judgment; and

3. Dismissing the complaint herein and awarding defendant all costs in this action.

JURY DEMAND:

Defendant demands trial by jury of all issues of fact herein.

Dated: New York, New York
August 20, 1974

WEIL, LEE & BERGIN

By _____
Gilbert E. Weil
Attorneys for Defendant
Office & P. O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

BEST COPY AVAILABLE

Deposition of Donald W. Randall

A A copy thereof.

Q Did you prepare the original agreement?

A If you mean by prepare, did I put this agreement in this form and cause it to be typewritten, yes.

MR. BISCO: Off the record.

(Discussion off the record.)

Q What was done with the agreement after you did what you say you did with it?

A The document in question was prepared -- was written, typewritten, at the direction of Mr. Bregman and Mr. Kaplan, and when it was completed in this form, to the best of my recollection, the -- one or more copies were delivered to Mr. Kaplan who, again, as I recall undertook to have the document executed by himself and Mr. Bregman.

Q Do you have a copy of the signed agreement? I just want to make sure it was signed.

MR. WEIL: It was signed by Mr. Kaplan.

MR. BISCO: I know that.

MR. HAFNER: Do you want to see it?

MR. BISCO: We don't have to, then.

Q You know it was signed by David Kaplan and then by Walter Bregman?

A I have subsequently seen a copy of this document

with the signatures of both Mr. Bregman and Mr. Kaplan.

Q Who was Mr. Kaplan at the time?

A Mr. Kaplan at the time was the same Mr. Kaplan that he is now, but at that time, he was president --

Q I mean in NCK.

A Mr. Kaplan at that time held the position of president and possibly treasurer, but in any event, president of Norman, Craig & Kummel, Inc.

Q When you say Norman, Craig & Kummel, Inc., you mean what we refer to as the New York Company?

A More precisely, I am talking about the company which is the predecessor company of NCK organization which is the plaintiff in this action, I understand.

Q What did you do with the agreements of June 17, 1970 after it was signed by the parties?

A My recollection on this kind of a housekeeping matter is necessarily vague.

MR. WEIL: May we have established whether he does or not remember what he did with it?

MR. BISCO: He can tell us. He is very precise, you know.

A It is my recollection that a signed copy of this document was returned to me in due course, whenever that was, and I placed that copy in the files which I

maintained of similar agreements.

Q Was there any agreement similar to this in the company's experience up to that time?

MR. WEIL: I object to the form of that question, Mr. Bisco. I think it is too vague and indefinite.

MR. BISCO: Let's see if he can answer it.

MR. WEIL: I will still object to it. I am not instructing him not to answer. I am registering my objection.

MR. BISCO: You have in mind the stipulation as to whether the objection as to form are to be noted in the deposition?

MR. WEIL: Yes. I don't know what is meant by an agreement that is similar to this one. I don't know what similarities you are referring to.

MR. BISCO: I don't know either. He used the term, so I am going to ask him. Let's see if he can tell us.

A With regard to this agreement, I would consider and considered at the time that it was similar to other agreements relating to employment of individuals in the company -- by the company, and there were other agreements in my files and in the general corporate files relating to

constituent documents.

Q Right. That's all for that.

I show you three green sheets and ask you to tell us what they are, if you know?

(Referring.)

A The three sheets that you have handed me are what I would characterize as a, shall we say, ledger record or parts of a ledger record, that was maintained by Roselou Flannigan, in which she recorded the essential details of each sale of shares or of each transfer of shares of the company, and these three sheets in particular relate to three transactions which involved Mr. Bregman, three share transactions which involved Mr. Bregman.

Q Have you seen those papers before?

A I can't be sure. I have seen similar records --

Q Just whether you have seen these papers.

A Whether I've seen these three?

Q Yes.

A I can't recall.

MR. WEIL: Are we going to mark those?

MR. BISCO: All right, mark it Plaintiffs' Exhibit 23-A, B, and C, please.

(Documents above referred to were marked

Plaintiff's Exhibit 23-A, B, and C for identification, this date.)

Q Whose writing is the handwriting on these pages in Exhibit 23?

(Referring.)

A Well, there are a couple of handwritten entries that I can't be certain of, but for the most part the handwriting on these three pages is that of Roselou Flannigan, to the best of my ability as a handwriting analyst.

Q Not as an analyst, but just from your recollection.

A Yes, my recollection is that that's Roselou Flannigan's handwriting. There are a couple of numbers there with a different pen and I can't be sure, but it doesn't change the essence of my answer.

Q All right.

Do you remember, in connection with the bank loans that the company made, first from Chemical Bank and then from Chase Manhattan Bank, that subordination agreements by the major stockholders were required?

A As to the loan made or the loan obtained by Norman, Craig & Kummel from Chemical Bank, yes. I

Beresford, Walter W. Bregman, Thomas K. Myers and Edward A. Roncarelli respectively amending their stockholders agreements with the corporation."

A Yes, I see that.

Q Is that correct?

A I think not.

Q What is incorrect about it?

A Mr. Bregman's name is listed and to the best of my knowledge no such agreement between the corporation and Mr. Bregman was ever signed.

Q How did you come to put his name in there?

A It is just barely possible that I made a mistake.

Q Why is it only barely possible?

A Because I usually do not make mistakes.

Q You do not know for a fact that Mr. Bregman did not sign an agreement, do you?

A No. That would be knowledge within Mr. Bregman's mind.

Q I think you may want to make a correction. It is up to you, ~~at~~ A page 18 of your last testimony. You said in lines 5 to 7 in answer to the question your fees are whatever you billed Mr. Bregman, is that right? "Answers: My fees are whatever I bill or will be whatever I bill him for, my services

rendered directly to him, in the matters apart from this litigation." Aren't you going to bill him for the litigation?

A I think the answer, even though there is a comma that really doesn't belong there, a comma after the word "for" at line 6, but aside from that I think the answer is what I intended.

Q That you are not going to bill him for this litigation?

A I think that is what it says.

Q I know. Do you really intend that?

A That is what I said.

Q Do you want to change it?

A No, I don't want to change it.

Q You are not going to bill him for this litigation?

A I don't know what you are driving at but I don't intend to bill Mr. Bregman for any legal fees, in connection with this litigation because I am not representing Mr. Bregman in this litigation.

Q You said you were co-counsel.

A I recall using that term and my intention when I used that term, which may be --

MR. WEIL: Can we refer to that part of

the transcript. Off the record.

(Discussion off the record)

A If it is all right with you, we can strike the answer that I started to give and I can answer it again referring to the page in the previous testimony.

Q I don't know. Did you use the term co-counsel, that you were co-counsel in this litigation, didn't you?

MR. WEIL: He did not say he was co-counsel in the litigation.

MR. BISCO: All --

MR. WEIL: That is what I want to make clear by referring back to the transcript.

A Let me continue my answer.

Q You said at page 30 "I might say co-counsel for Mr. Bregman which is the firm of Weil, Lee & Bergin" and then you were asked who was the other counsel and you answered "me." You were then asked when did you become counsel. "Answer: On or about July 15, '73."

MR. WEIL: Obviously there was no such litigation in July of 1973.

A So, therefore, -- then I will put it on the record just to make it clear -- when I used the term

co-counsel in the previous testimony it was intended to mean only the fact that I have in the past, since or subsequent to July 15, 1973, acted as counsel for Dick Mr. Bregman on what you might call a personal basis in connection with certain matters and it was not intended to mean or imply that I ~~mean~~ am co-counsel with Dick the firm of Weil, Lee and Bergin in the pending litigation in connection with which this testimony is being given.

Q Yet you advised with them often about the pending litigation, did you not?

A No.

MR. WEIL: I will just enter an objection to the form of that question. The word "ddvised" is too vague and general.

Q You had several visits to their office during the course of the litigation, did you not?

MR. WEIL: I object to the word "several." I think he said he had about three.

A And only in connection with ~~my papers~~ appearance here as Dick a witness.

Q You testified that you had three -- first you said three or four visits to Mr. Weil's office. Then you said three before you were called as a witness.

That is true, isn't it?

A May I -- would you please direct me to the page of the testimony that you are looking at?

Q Sure. Page 177 and 178. You might also look at page 33.

A I have reviewed the -- I have reviewed my previous testimony at pages 33 and at pages 177 and 178. I would like to point out that the gist of my testimony at pages 177 and 178 is that over the period of time since approximately November 1, 1973 up to the present date there were really two different representative series of meetings that I had with Mr. Weil ~~or Ed~~ Dan or at his firm. The first series of meetings I attended in my role as personal counsel for Mr. Bregman and that series of meetings which consisted of as I think I have testified three, perhaps four, meetings, took place to the best of my recollection between November and the end of 1973.

MR. WEIL: Mr. Bisco, can the record reflect what is the fact? Give us some perspective that you instituted the litigation in January 1974.

MR. BISCO: Yes.

A To continue my answer, the other series of

meetings that I have had with Mr. Weil or his associate, Mr. Hafner, in their offices has been in connection with my testimony as a witness in this proceeding and those meetings took place beginning the fall or late summer of this year, early fall.

Q Are you admitted to practice in the U.S. Courts for the Southern District of New York?

A Yes.

Q Did you ever consider becoming a co-counsel of record in the litigation?

MR. WEIL: I object to the form of that question.

A I think I can answer it anyway. Whether it answers your question or not, let me say that the question of whether it would be desirable for me to represent Mr. Bregman in connection with any litigation between himself and NCK or Mr. Greene did come up and it was decided between myself and Mr. Bregman that it would not be desirable and inasmuch as Mr. Weil's firm had already been retained by Mr. Bregman to counsel him in connection with matters relating to the termination of his employment and given the fact that Mr. Weil and his firm have considerable expertise in litigation, it was decided that Mr. Weil's firm should represent

Mr. Bregman in connection with any such litigation.

Q Why wasn't it considered desirable that you should become co-counsel of record?

MR. WEIL: If any of this involves privileged communications --

A It is a privilege between myself and Mr. Bregman as to whether or not -- I think a discussion of whether or not I should represent him or he should use some other counsel is within the scope of the attorney-client privilege and has not been waived and I cannot waive it.

Q You never stopped representing Mr. Bregman, did you?

MR. WEIL: In what capacity, Mr. Bisco? I object to the form of the question unless you state in what capacity because the witness has carefully distinguished what he means by representing.

MR. BISCO: I think he can answer the question.

A I want to make it clear that I have -- to the extent that I have represented Mr. Bregman in regard to anything it has been at his express request and I could -- would say that at the present moment there

is no pending matter as to which I am representing Mr. Bregman. Whether that means that I have stopped representing Mr. Bregman, I will leave that to you to figure out.

Q Did Mr. Bregman ask you to stop representing him in any matter?

A No.

Q You had no qualms -- that is the very word you used, no qualms -- about representing him in his dealings with reference to the stock that he supposedly had under option from Mr. Greene. You had no qualms about it.

MR. WEIL: Again, I will make the same objection to the use of the word "qualms" and also with regard to the word "representing."

Q You may answer.

A Again, I will say Mr. Bregman from time to time during the period from -- certainly after July 15, 1973 up to about the end of 1973 called upon me from time to time for advice, legal advice, and counsel concerning various matters which I furnished to him. As I just testified there are no pending or outstanding matters as to which I am currently counseling Mr. Bregman as attorney.

Q Or currently counseling Mr. Weil or his firm?

A I am not retained by Mr. Weil's firm. I have no fee arrangement with Mr. Weil. I am here pursuant to agreement simply to avoid the necessity of going through legal process to compel my being here, as an accommodation to your firm and to the parties. However, I am here as a witness. My compensation for participating in these proceedings is represented or has been and will be represented in each case by the sum of $32 for each such appearance which is the statutory witness fee and mileage.

MR. BISCO: Off the record.

(Discussion off the record)

MR. BISCO: I have no further questions.

MR. WEIL: You were just questioning him with regard to the Board minutes of December 15, 1972, Plaintiffs' Exhibit for identification 41 and more specifically with regard to item 9 on Exhibit 41B concerning the reference thereto and agreement between the corporation and Mr. Bregman. I notice also that on Exhibit 41A there is a statement that with regard to the documents which would include the item 9 on

fulfill these capacities, negotiate, consult, advise?

A I am not sure I understand the purpose of the question. You have to bear in mind that the line between negotiating --

Q Let me ask you this. Let's let that go a minute. Did you represent NCK as an attorney in every transaction it was involved in?

A No.

Q Mr. Randall, I refer you to the standard stockholders'agreement signed by Mr. Bregman and previously identified as Plaintiffs' Exhibit 1. Would you take a look at that and refresh your recollection as to it. Did you render any legal advice to NCK with regard to this document?

A I think I have testified before to some extent on this point, but again to sum it up. The document which is marked as Plaintiffs' Exhibit 1 is a copy of a four-page printed form which bears the title "Stockholder's Agreement." This form of agreement was being used when I joined the company in 1967 as the basic agreement between the company and each individual who purchased the shares of the company. It is my understanding based on knowledge that I acquired while I was employed by NCK and was performing

the functions of Secretary and/or house counsel that this form of agreement had been in effect and had been used for this purpose for at least several years prior to 1967 substantially in this exact form.

Q Did you draft it?

A Obviously I did not draft it because as I said it had been in effect in this form for a number of years.

Q Did you render any legal advice to NCK with regard to the transaction shown in that document? In other words, the transaction between NCK and Mr. Bregman.

A Let me see if I understand you. The document which has been marked Plaintiffs' Exhibit 1 is an agreement covering -- and I think there is adequate testimony in the record on this -- covering a purchase of shares of stock of what was then Norman, Craig & Kummel, Inc. by Mr. Bregman and I think I already testified that in view of the date of this document, which is October 25, 1967, I have no recollection of having been involved in the transaction at all.

Q So the answer to my question is?

A The answer to your question is no.

Q Did you negotiate in any way for NCK

with Mr. Bregman with regard to this transaction?

A No.

Q Did you represent NCK in any manner with regard to this transaction as an attorney?

A No.

Q Do you know who did?

A I think we ought to make it clear that having reduced the terms and conditions of the holding of shares as between the company and individual shareholders to a printed form, it became essentially unnecessary for anyone to function in a role of attorney with regard to each of these succeeding transactions.

Q Did you receive any confidential disclosure or information from NCK in your role as house counsel with regard to this transaction?

A Confidential from whom?

Q You testified you were the house counsel for NCK. There must have been some confidential communications between you and NCK. Did you receive any such communications with regard to this document?

MR. BISCO: That is a hard question to answer.

A It is a hard question. I think I know what

president of NCK. The draft that I wrote was based in turn on a written memorandum or letter from Mr. Bregman to Mr. Kaplan in which Mr. Bregman set out the terms of the agreement that had been reached between him and Mr. Kaplan concerning his coming back to New York from his post in London and the various details in connection with that transfer. On the basis of that document I prepared a draft and I think it is fair to say that the -- that Plaintiffs' Exhibit 3 is substantially in the form of my draft.

Q Would you answer the question? Did you render any legal advice with regard to this transaction?

A Without comparing Mr. Bregman's memorandum or letter and Plaintiffs' Exhibit 3, it is very hard for me to be precise and say as to this paragraph I suppose it could be said that this is legal advice.

Q Let's put that aside for the minute then. Did you negotiate in any way for NCK with Mr. Bregman with regard to this tranaction?

A No.

Q Did you receive any confidential disclosures other than what Mr. Bregman knew from NCK with regard to this transaction?

A No.

okay, yes,that is fine, and my recollection is that he then took it upon himself to either hold it to await Mr. Bregman's arrival in New York for further discussion or perhaps even sent it to Mr. Bregman in London. I really do not know at this point just how that happened but in any event the June 17, 1970 document was ultimately signed by both parties.

Q I would like you now to take a look at Plaintiffs' Exhibit 9C --

MR. BISCO: Defendant's Exhibit.

Q I am sorry. Defendant's Exhibit 9C, the paragraph on that page, page 3 of that document, numbered 4A. Would you read that, please.

A I think we have to back up to the language that leads into paragraph 4A. The gist of which is that Mr. Bregman is saying that certain changes ought to be made and I will quote. "In the unlikely event that you wish to sever my relations with the company or remove me from the position of CEO. This should include A: Payment in full on all my shares owned at the time without regard to the three year vesting period described in the current stockholders' agreement."

Q Mr. Randall, what do you understand the initials CEO to mean?

A I think it is clear from the context of Mr. Bregman's letter that CEO means Chief Executive Officer.

Q What did you do or what was the outcome of that particular passage of Mr. Bregman's letter, Defendant's Exhibit 9C?

A Referring now to Plaintiffs' Exhibit 3, paragraph 8, the provision that has just been quoted from Mr. Bregman's letter, is reflected in Plaintiffs' Exhibit 3 in the following language: "If your employment is terminated by NCK, all shares of the capital stock of NCK then owned by you will be repurchased in accordance with the second part of paragraph 3 (If the Stockholder (i) should at any time die:) of the Stockholders' Agreement dated October 25, 1967 between you and NCK, without regard to the length of time you have held such shares. Your Stockholders' Agreement is hereby amended accordingly."

Q Mr. Randall, I will refer you to page 4 of Mr. Bregman's letter of January 1, 1970 which has been identified as Defendant's Exhibit 9D and I would like you to read that subparagraph numbered 5B on that page for the record, please.

A Paragraph 5B reads as follows: "Under the current stockholders' agreement, I believe my pay back

upon termination can be limited to $20,000 per year and 4% interest on the unpaid balances. Obviously this is unreasonable in today's money market. I suggest a program of payment in equal fifths (20% per year) with average yearly bank rate interest paid on the unpaid balances."

Q As to that specific passage of Mr. Bregman's letter, what did you do or how was that provided for in the June 1970 agreement?

A Referring to Plaintiffs' Exhibit 3, paragraph 9, the language that I have just read from Mr. Bregman's letter is incorporated in that document as follows: "If your employment with NCK is terminated for any reason, either by you or by NCK, payment for the shares of capital stock of NCK repurchased from you will be made in five equal annual installments. The first such installment will be paid at the closing and the remaining installments at yearly interest intervals thereafter, with interest from the closing date at a rate equal to the average prime rate charged during the period by the principal New York banker of NCK. Paragraph 5 of the Stockholders' Agreement dated October 25, 1967 between you and NCK is hereby amended accordingly."

Q I would like to refer you now to Plaintiffs' Exhibit 9 for identification. This document previously has been described and identified. Would you tell us if you were called upon to render legal advice to NCK with regard to that transaction?

MR. BISCO: What is Exhibit 9?

MR. HAFNER: The Greene option.

A The answer is no.

Q Did you negotiate on behalf of NCK any part of that document or any of the provisions of it?

A No.

Q Did you receive with regard to that document any confidential disclosures that would not have been known to Mr. Bregman?

A No.

Q Did you sign that agreement?

A No.

Q Who did?

A It is signed on behalf of Organization by Mr. Norman and of course is signed by Mr. Greene.

Q Are either of these gentlemen attorneys or were they at the time?

A Not to my knowledge. As to Mr. Greene, I really have no idea.

Plaintiffs' Exhibits 23A, 23B, 23C

(three ledger sheets kept by Roselou Flanagan reflecting three Bregman purchases of shares)

PLTF. EXBT. FOR IDENT.

EXBT. 23A 11/21/74

M. KORTMAN WALTER W. BRUHMAN

TOTAL PURCHASE PRICE: $67,600.00

10,000 Shares - Class "A" Stock @ $6.76 (12/31/66 price)

18-159 TIFFANY "EYE EASE" HAMMERMILL LEDGER

Date of Subscription: October 25, 1967

Date of Payment: February 15, 1968

Date Stock Issued: February 15, 1968

Certif. No. ~~NA~~ 270

Transferred to "B" Stock - 10/18/71

Part of Certif. #200

Subject to
6/17/72 - Amended Agreement - Stockholders Folder

-51a-

BEST COPY AVAILABLE

PLTF. EXBT. FOR IDENT.

23 B

DEFT. EXBT. 11/21/74 M. KORENMAN WALTER W. BREGMAN TOTAL PURCHASE PRICE: $57,900

10,000 shares - Class "A" @ $5.79 per share (Dec. 31, 1967 Price)
(Purchase from N.B. Norman)

18-159
"EYE EASE" HAMMERMILL LEDGER

Date of Subscription: February 13, 1968

Date of Payment: July 30, 1968

Date Stock Issued: 7/30/68

Certif. No. ~~NA~~ 285

Signed Amended Stockholders' Agreement - 2/6/68

Transferred to "B" Shares. 10/28/71

Part of Certif. # 2001

Subject to amended agreement dated 6/17/70 (Stockbridge Trust)

-52a-

PLTF. EXBT. FOR IDENT.

DEFT. EXBT. 23C 11/21/74 M. KORENMAN WALTER W. BREGMAN

TOTAL PURCHASE PRICE: $69,800.00

10,000 Shares - Class "A" Stock @ $6.98 (12/31/68 price)
(Purchased 6,000 Shares from N. B. Norman; 4,000 Shares from B.D.K.)

18-159 "EYE EASE" HAMMERMILL LEDGER

Date of Subscription: March 12, 1969

Date of Payment: July 8, 1969

Date Stock Issued: ~~AA 720~~ NB-2030

Certif. No.

Subject to amended agreement Dated 6/17/72
in Stockholders folder

11/10/72 Transferred to "B" Shares
Certificate # NB 2030

-53a-

Notice of Motion to Disqualify Counsel for Defendant with attached Affidavit of Leonard G. Bisco dated December 31, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD., and WILLIAM E. GREENE, JR., Plaintiffs, -against- WALTER W. BREGMAN, Defendant.	74 Civ 776 (C.B.M.) NOTICE OF MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of LEONARD G. BISCO, sworn to December 31, 1974, the previous affidavit of LEONARD G. BISCO, sworn to the 30th day of October, 1974, on the motion to compel answers to questions on deposition of DONALD W. RANDALL, the depcsition of DONALD W. RANDALL taken October 16, 1974, November 21, 1974 and December 12, 1974 and upon the pleadings herein, the undersigned will move this court at 9 o'clock in the forenoon on January 15, 1975, or as soon thereafter as counsel can be heard, for an order granting the following relief: (1) disqualifying Donald W. Randall and Weil, Lee & Bergin from acting as attorneys for defendant Walter W. Bregman; (2) enjoining the said attorneys, or any member of the firm or employee of Weil, Lee & Bergin from acting, directly or indirectly, as attorneys for defendant Walter W. Bregman in this litigation or any matter relating to the option given by plaintiff William E. Greene, Jr. to defendant Bregman for the purchase of 5,000 shares of Class B common stock of the plaintiff The NCK Organization Ltd.; and (3) such other relief as may be just and proper.

Dated: New York, N.Y.
December 31,1974

Yours, etc.

BISCO, WINKLER & HIGGISTON

By _____
Partner

To:
WEIL, LEE & BERGIN
Attorneys for Defendant
60 East 42nd Street
New York, N.Y. 10017

Attorneys for Plaintiffs
Office and P.O.Address
645 Madison Avenue
New York, New York 10022
(212) 832-2600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD., and WILLIAM E. GREENE, JR., Plaintiffs	:	74 Civ 776 (C.B.M.)
-against-	:	AFFIDAVIT
WALTER W. BREGMAN, Defendant	:	

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LEONARD G. BISCO, being duly sworn, deposes and says:

1. Deponent is a member of the firm of Bisco, Winkler & Higgiston, attorneys for plaintiffs, and is in charge of this action. This affidavit is made in support of a motion to disqualify Donald W. Randall and Weil, Lee & Bergin as attorneys for the defendant Walter W. Bregman. A previous motion had been made returnable originally November 7, 1974 to compel Donald W. Randall, whose deposition was being taken, to answer certain questions which he had refused to answer upon the ground of privilege. Any demand for relief on that motion has now been withdrawn because the witness has answered the disputed questions but the record remains and the present application is based as well upon my previous affidavit, sworn to October 30, 1974 and Exhibit A annexed thereto.

2. The previous affidavit sworn to October 30, 1974 shows what this action is about and the nature of Mr. Randall's testimony on the first day of his deposition, which covered pages 1 to 63A. I had then told the attorneys for the defendant that I intended to move for disqualification of him and them and they asked me to wait upon the making of such motion until his

testimony was finished. The testimony is now finished and all of it will be submitted in support of this motion. It is over 300 pages long but the Court may want to see the entire testimony to judge the caliber of the witness; only parts relate to the counselship for defendant and they will be shown in the present affidavit.

3. The turning point of this case really depends upon an agreement dated June 17, 1970 which was prepared by the witness Randall and a copy of which is annexed to the complaint herein as Exhibit B. There is a clause, paragraph 8, in that agreement which requires the plaintiff The NCK Organization Ltd. (Organization) to purchase at present book value any stock which defendant Bregman may have at the time that Organization may terminate his employment. Defendant Bregman claims that this applies to the 5,000 shares which he had under option from William E. Greene, Jr. and he brought suit against Greene to recover damages for failure to comply with his exercise of the option. The damages claimed is in the amount of $45,000. This action was started by Organization in whose behalf we sent a copy of a proposed complaint for a declaratory judgment to defendant's attorneys, Weil, Lee & Bergin, on January 8, 1974. This was followed by an appearance by these attorneys for the defendant, then by a suit by them against Greene for breach of the option agreement. The action was removed to this court on or about February 21, 1974 and by stipulation Greene was joined as plaintiff in the declaratory judgment action described in paragraph 2 of my previous affidavit.

4. There is considerable testimony about the June 17, 1970 agreement in the present record and it will be referred to herein. It leaves considerable doubt as to whether the witness Randall, who had prepared the June 17, 1970 agreement and who signed as vice president of Organization all of the agreements

with the purchasers of the Kaplan shares and who participated throughout in the paper work to accomplish the purchase of the Kaplan shares, had forgotten the provisions of the June 17, 1970 agreement at the time of the Kaplan deal in July, August and September, 1972 and whether he was under a duty to Organization, by whom he was employed, to reveal the consequences of his seeming forgetfulness when he did discover the true facts. It appeared that at the time of the transaction whereby defendant Bregman was given the option to purchase 5,000 shares of Organization stock from plaintiff Greene that those acting for Organization had either completely forgotten the special agreement that Bregman had or never knew of it. This applies to Norman B. Norman, the chairman and chief executive officer of Organization, who had forgotten the June 17, 1970 agreement, to Mr. Winkler who was preparing papers as counsel for Organization and who had never at that time been told of the agreement and even to the witness Randall who had prepared and filed the agreement but who testified that he did not think that he remembered it at the time of the Kaplan transaction (55-58) [all numerical references will be to the deposition of the witness Randall unless otherwise stated]. Without this agreement defendant Bregman would have no rights whatsoever because all parties signed standard stockholder's agreements which were in vogue with Organization and its employees, of whom Bregman was the only exception, which called for a holding period of 36 months of employment before they were entitled to require Organization to purchase stock at current book value. Bregman had neither employment nor 36 months thereof from the time that he sought to acquire possession of his shares under the Greene option. If successful in this case he will be the only one who, without putting up any money, is entitled to buy shares at $5.47 and immediately turn them in to Organization at $12.75

a share. For all other parties who put up their money, viz. Beresford, Myers Roncarelli and Maas, to buy Kaplan shares they had to hold the shares for 36 months of employment in order to get current book value. Greene, who was the major purchaser, was not entitled to have any of his shares redeemed at current book value until 1976 and thereafter. Had Randall remembered the agreement that he prepared on June 17, 1970 and had he spoken about it, which would have beenhis duty as house counsel to Organization, there would be no case whatsoever because Bregman would have taken the option on any terms that would have been offered to him since he was putting up nothing for it (Bregman dep. p. 49).

5. The following are references to the second and third installments of the deposition of Randall which bear upon his acting as attorney in a conflicting position first for Organization and then for Bregman for exactly the opposite side of the same transaction. This is in addition to the previous pages with reference to the first installment of Randall's deposition which are noted in my October 30, 1974 affidavit. Pages 92 to 108 deal with the subordination agreement signed by Bregman with Chemical Bank dated December 30, 1971 which refers only to the standard stockholders' agreement signed by Bregman on October 25, 1967 and February 5, 1968 and which omitted any references to the June 17, 1970 agreement. The subordination agreement was prepared by Randall. A printed form of the agreement was submitted to the attorneys for the bank by Randall with a statement that all agreements with major stockholders were substantially identical. The differences that he was having with Norman, chief executive of Organization some four months prior to December, 1972, which finally resulted in his discharge, while he still remained friendly with Bregman (109-118). He signed the agreement with Messrs. Myers,

Roncarelli, Beresford and Maas, as vice president of Organization and made a number of changes in the agreement before signature (135-138). Testimony that everyone would have to wait for 36 months of ownership of stock acquired from Greene and of employment until Organization was liable to pay current book value (144-147). Why Bregman did not sign any agreement (148). The differences between the Bregman case and the case of other top executives (149-153). Doubt whether he ever mentioned the June 17, 1970 agreement to Mr. Winkler, the attorney for Organization, or to Mr. Beresford who was active in closing the transaction (161,163, 164).

6. After some hesitation he also included Myers in his answer to the question whether he had ever told anyone about the June 17, 1970 agreement. When asked why he hesitated he said that there had been a conversation in October, 1973 at which Myers was present. Since he was not Myers' lawyer there was no privilege as to this conversation (164,165) and this is one of the main reasons why the objection previously made as to attorney-client privilege had never properly been made. He then dwelt upon the conversation with Bregman and Myers; he told them that he thought that Bregman might have some rights under the June 17, 1970 agreement but Myers, having no such agreement, would be in a much more dubious situation as far as the Greene option being of any value to him (166,167). By this time he had looked again at the June 17, 1970 agreement. The meeting took place at his house and he advised Bregman he might have some rights if he exercised the Greene option (168). Then he was asked if he had such an opinion when the papers were signed on August 31, 1972. He said that might have been his opinion at the time but he was not called upon to render any opinion (168,169). He said that he did not think about the June 17, 1970 agreement and never told Beresford, Winkler or anyone else about

Bregman's possible rights but 14 months later when he did think about it and he thought Bregman had some rights he did not tell anyone in Organization or Winkler about his opinion (165,170).

7. While house counsel for NCK Organization and NCK, Inc. in 1972 he was on a full time basis at a salary of $47,500 (171). He is admitted to practice in the Southern District of New York (214).

8. He prepared the letter that Bregman sent to the company on October 8, 1973 stating what his various rights were because of the termination of his employment (171,172). At that time he had formed the opinion that Bregman had the right to purchase stock under the Greene option at $5.47 a share and tender it to Organization at book value as of December 31, 1973 but a decision had not yet been made by Bregman whether he would exercise the Greene option and whether the letter had reference to stock that he might purchase from Greene under the option (172). Bregman's decision was made some time later after he had consulted with Mr. Weil but even then it was not an irrevocable decision until he sent the letter on November 5, 1973 exercising his option (173). The decision until then was tentative, based on advice that Randall had given him in the role of counsel (173,174).

9. It was probably in the latter part of October or early November that he went with Mr. Bregman to Mr. Weil's office. He told Mr. Weil that he was the former house counsel for Organization and NCK and Mr. Weil was "under no delusion whatsoever as to who I was and what my former position had been with the company. In fact, it was a matter of specific conversation between Mr. Weil and me" (175). He participated with Mr. Weil in the drafting of the letter of November 5,1973 by Bregman to Greene in which Bregman sought to exercise his option to purchase 5,000 shares of Class B common stock of Organization

(176, 177). He was in Mr. Weil's office not more than three times up to the time of receiving word that his deposition was wanted but he visited his office several times in connection with his testimony as a witness on deposition (177,178). He prepared a conformed copy of the stockholder's agreement of October 25, 1967 signed by Bregman and at first said he did not deliver this to Mr. Weil or his assistant (180,181) but then when he was shown a letter from Mr. Weil's firm, dated June 19, 1974, sending to me a copy of the document prepared by Randall, he said his recollection was refreshed and he changed his testimony to say that he prepared the document and furnished it to Mr. Weil (181, 182).

10. At the third and final session of the deposition the relevant testimony bearing on counselship may be found on the following pages: The minutes of a meeting of the directors of Organization on December 15, 1972, at which Randall was secretary and which he had prepared, refer to an agreement signed by Bregman as well as the other key execu. ves; as to this the witness said that to the best of his knowledge Bregman had not signed an agreement. "It is just barely possible that I made a mistake * * * I usually do not make mistakes" (209). He said he was not going to bill Bregman for services in the litigation because he was not representing him in the litigation (210). He tried to explain what he meant before by using the term "co-counsel" (210-212). He had said at page 30 that he was "co-counsel for Mr. Bregman" with the firm of Weil,Lee & Bergin and that he became counsel on or about July 15, 1973 which was the exact date of his termination of employment with Organization (30-31). Mr. Bregman, who was still employed until January, 1974, was a "very knowledgeable fellow" and did not speak to him about representing him personally until Randall's

employment terminated on July 15, 1973 (30,31). When asked the direct question "Do you really think that beginning July 15, 1973 you were free to represent Mr. Bregman personally against the company in the same matter that you worked on for the company" he answered "I had no qualms about it whatever. I might point out I fail to see how this line of questioning is germane to the pleadings I have seen" (31,33). He also testified at the first session that he had had a talk with "co-counsel" whom he had visited three or four times starting November 9, 1973 more or less contemporaneously with Bregman's exercise of his option to purchase Greene's stock. He visited Mr. Weil's office to discuss the declaratory judgment action which had been brought by Organization (35,36). He said then without qualification that he was going to bill Bregman and that the bill would start from July 15, 1973 (36). He says he advised on the present case when called upon by Mr. Weil or Mr. Bregman for advice (36).

11. He was asked why he did not become co-counsel of record in the present litigation and he said it was decided by Mr. Bregman and himself that it was not "desirable" for him to represent Bregman in litigation and it was then decided to use Mr. Weil's firm for that purpose (214,215). Although he insisted again that he had "no qualms" about representing Bregman personally he merely gave legal advice and counsel from July 15, 1973 to the end of 1973 concerning various matters on which he was consulted (215,216).

12. On cross examination by defendant's lawyers he said, in contrast to his later statements that he was just acting as messenger or errand boy, that "I certainly understood it to be my responsibility to see to it that the transaction, whatever it was, was properly handled from a legal standpoint" (230). He claimed now that he was not acting as counsel to

Organization in the transaction (256,259,260) and yet he was the very one who signed the purchasing agreements as vice president (260,261) and who made numerous changes in the agreements before signature (264,265,266). These changes were "editorial or aesthetic not changing the substance", changes which "I thought were improvements" made "for the sense of clarity, consistency and all that" (267). He made the changes not so much because of his legal training but because he thought the document "was not as clear and concise as it could be and therefore since I probably did not have anything else to do that afternoon I decided to neaten it up a bit" without asking anyone's permission to do so (268). No substantial changes were made he said and the way he would characterize his position in the transaction was ministerial. He was an errand boy (267-271). Again he said he was not acting as counsel for Organization (272,277-280). He tried to explain what he meant by saying he had "no qualms" about representing Bregman personally; he meant by this he had no information that Bregman did not already know (272, 273). He then brought out for the first time that his first contact with Mr. Weil was by a telephone call from Mr. Weil on October 16, 1973 (273) in which the question was asked about the propriety of his representing Mr. Bregman and he said "I thought about it and had no problem with it" (274,275). "There was no ethical or legal obstacle to my representing Mr. Bregman" (276).

13. On re-direct examination he said he testified that he could not say why Bregman was "sure" at the time he received the Greene option that he could exercise it at any time and tender the shares to Organization at current book value (281-84). This contrasted with his own testimony that the question was not finally decided when he advised Bregman in October, 1973 and prepared the letter of October 8, 1973. At 287-288 he testified

that he advised Bregman somewhere between October 3rd and October 8th that he had at least the "arguable" right to exercise the Greene option and then tender the stock to the company at current book value. This advice was given in the presence of Mr. Myers (288). Then it appeared for the first time that there was a written memorandum of advice. In July, in contrast to his previous testimony, he did not give him the same advice that he subsequently gave. Instead there was a written memorandum as to advice he gave him on this question (289). It appeared that this written memorandum had been given to Mr. Weil who made a statement on the record that insofar as it affected the Greene option there was no longer any privilege and therefore a copy of the written questions and memorandum would be furnished (290). At 291 he corrected his earlier testimony that it was not until October, 1973 that Mr. Bregman consulted him because Mr. Weil, who had received the written questions and answers from Mr. Bregman, called them to Randall's attention and he now says that the memorandum was handed to him July 16, 17 or 18 (291, 292). Prior to Mr. Weil's telephone call to him on October 16, 1973 he had discussed with Mr. Bregman the desirability of retaining other counsel because it might "if nothing else [be] awkward for me to handle personally". Bregman then said that he had "talked to Gil Weil whom you know and he has agreed to represent me. Gil and I had met at least once" (293).

14. At the time of Weil's telephone call of October 16th he discussed having been house counsel for NCK. "I had thought about the subject. It was not that he was oblivious to the question being raised" (295) but he satisfied himself an.. advised Weil that he did not think it was a problem and he does not want to change his testimony that he had "no qualms" about

representing Bregman against the company. He further testified that at the closing of the purchase of the Kaplan shares he raised a question as to the sufficiency of New York State Transfer Taxes and requiring indemnity for the company from Kaplan and that he prepared the indemnity agreement (297-300).

15. A copy of the memorandum in Randall's handwriting was produced by Mr. Weil (290). In answer to the question of Bregman "Status of Greene Options - when exercised, must they be held specific time" it concludes with the statement that

> "Ultimately this all comes down to a question of whether or not you would be prepared to invest $27,500 in 5,000 of Greene's shares in order to have the opportunity to put some 'heat' on NCK. In my opinion there are enough risks involved to make this a very dubious undertaking."

A copy of the memorandum is annexed hereto as Exhibit A.

16. In cases such as this "even an appearance of impropriety requires prompt remedial action by the court", for there is no other way "to maintain the highest ethical standards of professional responsibility" and thus to preserve "the public's trust in the integrity of the Bar". (Emle Industries Inc. v. Patentex Inc., 478 Fed. 2d 562, 565; CA2 1973) Both counsel, Donald W. Randall, who sought without any "qualms" to represent the defendant Bregman as "co-counsel", and Weil, Lee & Bergin who acted as co-counsel with him, who sought and obtained his cooperation in the pursuit of the supposed rights of defendant Bregman against the plaintiffs, have been guilty of a breach of professional propriety. They must both be disqualified from acting any longer in defendant's behalf.

Leonard G. Bisco

Leonard G. Bisco

Sworn to before me this
31st day of December, 1974.

Marie A. Rak

Notary Public
No. 31-8424950
Qualified in New York County
Commission Expires March 30, 1976

Q 4. Status of Quine options? When exercised? Must they be held a specified time?

A. With regard to your option to purchase 6000 shares of NCK Class B Stock from Mr. Quine, the option is exercisable at any time. Although the option agreement does not specify the procedure, you would presumably give notice to Quine of your exercise of the option and would fix a date (say, 15-20 days) on which he would deliver the shares and you would pay the purchase price.

Until 8/31/75, the purchase (option) price is $5.47 per share.

The agreement between Quine and NCK Org. says nothing about a minimum "holding period" for ~~Edit~~ these option shares before the purchaser is entitled to be paid their full book value. Therefore, the question seems to be whether or not the three year holding period specified in your Stockholders Agreement (dated 9/25/67)

BEST COPY AVAILABLE

is applicable. If it is not there exists at least the possibility that, after having exercised your option to buy the Gruen shares and then terminating your employment you could require NCK to purchase those shares at the then applicable book value.

If this question were to be litigated — which would be quite likely if you were to force the issue — in my judgment the decision could go in any of at least three ways. Obviously, the most favorable result would be that the three year holding period is not applicable but NCK must nevertheless repurchase the shares in accordance with ¶ 3(b) of the Stockholders Agreement, i.e. at their current book value. But the possible result is that the Stockholders Agreement does not apply to these shares at all, either with regard to holding period or repurchase. This would place you in the position of continuing to hold 5,000 voting shares, without any obligation to sell them to NCK at any time and with no restriction on your right to sell them to anyone else. The worst result from your

standpoint would be that the three year holding period requirement applies and that the shares are subject to repurchase by NCK at the price you paid for them (such price being deemed for this purpose to be the "subscription price").

I could make a reasonably persuasive argument for any one of these results. To say the very least, the outcome of any such lawsuit would be hard to predict.

Ultimately, this all comes down to a question of whether or not you would be prepared to invest $27,500 in 5000 of Queen's shares in order to have the opportunity to put some "heat" on NCK. In my opinion, there is enough risk involved to make this a very dubious undertaking.

EXHIBIT A

Affidavit of Donald W. Randall

dated January 22, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

THE NCK ORGANIZATION, LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant.

- - - - - - - - - - - - - - - - - - - x

74 CIV 776 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DONALD W. RANDALL, being duly sworn, deposes and says:

1. This affidavit is made in opposition to the motion of the plaintiffs herein to disqualify and enjoin me and Messrs. Weil, Lee & Bergin from acting as attorneys for defendant Walter W. Bregman.

2. At the instance of the plaintiffs, my testimony as a witness in this action was taken by deposition on October 16, November 21 and December 12, 1974. My sworn deposition is included in the papers submitted by plaintiffs' attorneys in support of this motion. References to that deposition in this affidavit will be indicated by "DWR Dep.".

3. I am a member of the bar of the State of New York and of this court. For about six years prior to July 15, 1973 I was employed as house counsel by plaintiff, The NCK Organization, Ltd. (Organization) and/or its wholly-owned subsidiary, Norman, Craig & Kummel Inc. (NCK). Upon the termination of that employment, I was retained as counsel by defendant Bregman, who was then, and at all times material to this action had been, an

employee of Organization and/or NCK. In my deposition I testified at length concerning the extent of my representation, as an attorney, of Bregman and the nature of the matters on which I had given him legal advice and counsel. I declined to answer certain questions about my representation of Bregman which were, in my judgment, within the scope of the attorney-client privilege. On the basis of my testimony, counsel for the plaintiffs raised the question of whether, because of my previous employment as an attorney by Organization, it was proper for me to act as an attorney for Bregman. After my deposition testimony had been concluded, this motion was made on behalf of the plaintiffs.

4. I will attempt in this affidavit to draw to the attention of this Court the relevant facts which show that I should not be disqualified or enjoined from acting as an attorney for Bregman, and to dispel some of the confusion resulting from the factual inaccuracies, distortions and unsupported allegations and insinuations in the affidavit made by Leonard G. Bisco in support of this motion. I will deal only indirectly with the issue of whether or not Messrs. Weil, Lee & Bergin should also be disqualified, since it is clear that if I am not disqualified, they cannot be disqualified either.

5. The facts which are crucial to a decision on this motion, as it relates to me, can be separated into two distinct categories:

(a) The facts concerning the matters as to which I gave Bregman legal advice and counsel, and the scope of my representation of him in connection with such matters.

(b) The facts concerning my involvement and participation, as house counsel for Organization and/or NCK, in transactions as to which it is alleged by plaintiffs that I subsequently acted as an attorney for Bregman on the "opposite side".

6. The relief sought by the plaintiffs in this motion is two-fold. They seek first to disqualify me and Weil, Lee & Bergin "from acting as attorneys for defendant Walter W. Bregman." Even if it is assumed that this Court has the power to enter, and enforce, an order disqualifying me from acting as an attorney for Bregman in any and all matters, including those outside the jurisdiction of the Federal courts, it is inconceivable to me that such unlimited relief would be granted in this case. I can only conclude, therefore, that in this respect plaintiffs' prayer for relief is ill-conceived and I will not take up the time of this Court by eliciting the facts which would show that such relief is unwarranted under the present circumstances. The plaintiffs seek also to enjoin me from acting as an attorney for Bregman "in this litigation or any matter relating to the option given by plaintiff William E. Greene, Jr. to defendant Bregman for the purchase of 5,000 shares of Class B common stock of ... Organization ...." As for enjoining me from acting as an attorney for Bregman "in this litigation," that would be a pointless exercise of the powers of this Court. I have not acted, am not acting and have no intention of acting in that capacity (DWR Dep., p. 211, line 24 to p. 212, line 10), nor will I receive, directly or indirectly, any attorney's fees in connection with this litigation (DWR Dep., p. 210, lines 18-21; p. 179, line 24 to p. 180, line 7). As for my being enjoined from acting as an attorney for Bregman in any matter relating to the Greene option, that issue is rendered virtually academic

by the fact that the option, and Bregman's rights thereunder, are the focal point of this litigation. Since I am not acting as Bregman's attorney in this litigation, and have no desire or intention to do so, to enjoin me in this regard would be equally pointless, even if there were grounds for doing so. But, as I propose to demonstrate, there are no such grounds.

7. As the pleadings herein show, Bregman is asserting a claim against plaintiff Greene as an individual, not as a representative or agent of Organization. This claim arises out of Greene's refusal to deliver to Bregman 5,000 shares of stock of Organization when Bregman sought to exercise the option which Greene, in his individual capacity, had granted to Bregman with respect to such shares. No relationship of attorney and client has ever existed between me and Greene, in connection with this option or otherwise. Consequently, insofar as Bregman's claim against Greene is concerned, I would be completely free to act as Bregman's attorney. To put it somewhat differently, the Greene option and Bregman's rights thereunder are matters between only those two individuals, and my former employment as an attorney by Organization, which is the basis for the relief sought by plaintiffs on this motion, is totally irrelevant. It follows, therefore, that my actions in advising Bregman as to his rights under the Greene option and in counseling him as to its exercise were neither improper nor unprofessional.

8. For reasons about which I can only guess, but which are presumably known to himself and his clients, plaintiffs' attorney, Bisco, has seen fit to embroider his affidavit submitted in support of this motion with a great number of misstatements and quotations of my testimony that are either incomplete, wrenched out of context or misleadingly juxtaposed. These, together with his unsupported assertions, implications

and innuendoes of unprofessional conduct on my part, paint a picture which I cannot permit to stand unchallenged and uncontroverted in the record of this action. Very little of what I am referring to has any relevance to the issues presented on this motion and, under different circumstances, I would ascribe it to the penchant of certain lawyers to go to any extreme in support of a weak position and would let it pass. But I cannot do so on this occasion and, therefore, I respectfully ask the indulgence of this Court while I draw attention to only a few instances of these tactics.

9. In paragraph 4 of his affidavit Bisco makes the following statement: "It [the testimony] leaves considerable doubt as to whether the witness Randall ... had forgotten the provisions of the June 17, 1970 agreement at the time of the Kaplan deal ... and whether he was under a duty to Organization ... to reveal the consequences of his seeming forgetfulness when he did discover the true facts." Paragraph 4 continues in a similar vein, until we come to this statement on page 4 of the Bisco affidavit: "Had Randall remembered the agreement that he prepared on June 17, 1970 and had he spoken about it, which would have been his duty as house counsel to Organization, there would have been no case whatsoever ...." Now, what is the purpose of this allegation of professional misconduct on my part? Obviously, it has no relevance to the motion for disqualification. Even if I had been negligent, or worse, in carrying out my professional responsibility to my former employer/client, that is hardly a reason to disqualify or enjoin me from acting as an attorney for Bregman. In the context of an affidavit in support of this motion, these statements are by any standard gratuitous. (It should be noted that the statements I have quoted are not cross-referenced

to any of my testimony.) In the absence of any other explanation, is it conceivable that Bisco would like this Court to infer, although he lacks the forthrightness to allege it, that I conspired with Bregman to conceal the existence of the contract provision which is the cause of his client's discomfort. If that is Bisco's purpose and intent, I would only point out that he does not direct the attention of this Court to the fact that the June 17, 1970 agreement, which contains this troublesome provision, was negotiated and signed on behalf of NCK by B. David Kaplan, who was at the time president of NCK and, with Norman B. Norman, a co-equal controlling shareholder of the company (DWR Dep., pp. 7-8). Perhaps this omission could be explained in its turn on the ground that Bisco would not want to put himself in the position of suggesting that Kaplan, who was and remains friendly with Bregman, was also a co-conspirator. In this connection, it is interesting to note Bisco's reference, in the next to last line of page 4 of his affidavit, to the fact that I "remained friendly" with Bregman in spite if my being fired by NCK. There is one other possible motive for Bisco's use of this motion as an excuse to drag in these extraneous matters. It is this possibility, more than any of the others, that constrains me to impose upon the Court by submitting this lengthy affidavit. In his zeal to advance the interests of his client, Organization, Bisco may be attempting to establish a foundation for an action by Organization against me when Bregman's claims are finally upheld, as I am confident they will be. As far-fetched as this might seem to a disinterested observer, it would not surprise me at all. So, in the interest of self-protection, I am serving notice by means of this affidavit that I have no intention of allowing my position to be prejudiced in such a manner.

10. Paragraph 5 of the Bisco affidavit starts out with this straightforward sentence: "The following are references to the ... deposition of Randall which bear upon his acting as attorney in a conflicting position first for Organization and then for Bregman for exactly the opposite side of the same transaction." One would expect there to follow a neat and reasonably precise catalog of specific "transactions" and of the facts showing that I have acted, at one time or another, as attorney in conflicting positions on opposite sides of those transactions. But let us look closely at what actually follows in paragraph 5:

(a) Bisco's first reference is to testimony concerning a subordination agreement signed in 1971 by Bregman and certain other shareholders in connection with a loan by Chemical Bank to NCK. While it is certainly true, as I testified, that I represented NCK as its house counsel with regard to this loan transaction and the related subordination agreements, I have never acted as attorney for Bregman in any matter having even the most remote relationship to the loan or his subordination agreement. There is no testimony to the contrary in the cited pages (92-108) of my deposition. Nor does Bisco make reference to any other testimony of mine which would support the assertion that I subsequently represented the opposite side of this transaction. Of course, he does manage to slip in the suggestion that I did something questionable, if not reprehensible, when I advised the bank's attorneys that "all agreements with major stockholders were substantially identical."

(b) The next sentence, beginning "The differences ...", purports to sum up ten pages of my testimony, but does not refer to any "transaction" or to my acting as attorney in any respect. Perhaps I am to be disqualified from representing Bregman because I "remained friendly" with him while having "differences" with Norman.

(c) Bisco then refers to my testimony about certain agreements which I signed as a vice president of Organization and to the fact that I made a number of changes in the draft prototype of these agreements which had been prepared by his partner, Winkler. This, at least, is a reference to a "transaction". But Bisco neglects to mention that Bregman never signed any such agreement and, consequently, was not a party to the transaction. The agreements in question contain provisions relating to the rights and obligations of certain purchasers of the so-called Kaplan shares. As I stated several times in my testimony (DWR Dep., p. 144, lines 6-9; p. 163, lines 9-16), Bregman did not buy any of the Kaplan shares, so there was no reason for him to sign such an agreement. It is manifestly impossible for me to have ever represented Bregman on the opposite side of this transaction.

(d) The next three sentences of Bisco's paragraph 5 can hardly be said to be illustrative of my acting as attorney on opposite sides of anything, but he does find an opportunity to refer again to my suspicious failure to mention the

June 17, 1970 agreement. Notice, however, that in this sentence Winkler, not I, is characterized as "the attorney for Organization." (See, also, the reference to Winkler at the middle of page 3 of the Bisco affidavit as "counsel for Organization.")

This tedious analysis of the Bisco affidavit could be continued for many more pages, but it is not necessary to do so. It is sufficient for my present purposes to state that in paragraphs 6 through 15 of that document, comprising the better part of seven pages, there is no explicit, or implicit, reference to an instance where, in acting as an attorney for Bregman, I represented the opposite side of a transaction in which I had previously represented Organization and/or NCK. Those paragraphs are replete with references to other, extraneous matters, such as my invoking the attorney-client privilege when Bisco thought I should not have done so, many more instances of my failure to tell someone or other about the June 17, 1970 agreement, the fact that I was paid a respectable salary for my services to Organization and NCK, and so on, and so on.

11. I will limit myself to one further comment on a particularly egregious example of Bisco's talent for taking unrelated fragments of my testimony out of their original contexts and putting them together in a way that distorts their meaning. In the first sentence of paragraph 12 of his affidavit Bisco quotes a statement which I made on page 230 of my deposition in response to a general question about my duties and responsibilities as general counsel of NCK. As is obvious from the context, I was not referring in my answer to any particular transaction, but rather to the generality of transactions over the period of several years during which I functioned as counsel. I went on

to testify at page 232 that I did not represent NCK as an attorney in every transaction in which it was involved. No one knows this better than Bisco, whose firm acted as outside counsel for Organization and NCK throughout this period. On the other hand, the testimony which is referred to in the next sentence of paragraph 12 of the Bisco affidavit was given in response to questions concerning specific transactions in 1972 as to which I did not perform the function of attorney for the company, and I so testified. (I have already pointed out in paragraph 10(d) above two instances in which Bisco, in his affidavit, described his partner, Winkler, as acting as attorney, or counsel, for Organization in connection with these very same transactions.) Thus, the conflict or inconsistency which Bisco would have led one to believe existed in my testimony turns out to be imaginary. Farther along in his paragraph 12, Bisco places heavy emphasis on the fact that a number of changes in the draft of a particular document were made at my suggestion. This, incidentally, is the agreement I referred to above in paragraph 10(c), which did not involve Bregman in any way, so the whole subject is irrelevant to the issues raised by this motion. Nevertheless, if the question of my having acted as counsel for Organization with regard to this transaction were at issue, it is clear that my suggesting such "changes" does not, of itself, decide the issue one way or the other. This is simply another instance where Bisco attempts to take advantage of the fact, which he well knows, that on a motion of this sort, involving lengthy pleadings, numerous exhibits and extensive deposition testimony, the Court may not track down each and every cross-reference in the motion papers, but will tend to rely on the assumed integrity of counsel and accept their sworn statements at face value.

BEST COPY AVAILABLE

12. Inasmuch as plaintiffs have failed to show that I have committed any breach of professional propriety in acting as an attorney for defendant Bregman, the motion to disqualify and enjoin me from acting in such capacity should be denied. A fortiori, the motion to disqualify and enjoin Messrs. Weil, Lee & Bergin must also be denied.

Donald W. Randall

Sworn to before me this 22nd day of January, 1975.

Notary Public

[illegible] A. NELLIGAN
Notary Public, State of New York
No. 31-4509284
Qualified in New York County
Commission Expires March 30, 19..75

BEST COPY AVAILABLE

Copy received
Bosco, Winkler & Hazleton.

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
WEIL, LEE & BERGIN
Attorneys for

Office and Post Office Address
60 East 42nd Street
Borough of Manhattan New York, N. Y. 10017

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,
WEIL, LEE & BERGIN
Attorneys for

Office and Post Office Address
60 East 42nd Street
Borough of Manhattan New York, N. Y. 10017

To

Attorney(s) for

Index No. 74 CIV 776 (CBM) Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION, LTD., and WILLIAM E. GREENE, JR.,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant.

AFFIDAVIT

WEIL, LEE & BERGIN
Attorneys for Defendant

Office and Post Office Address, Telephone
60 East 42nd Street
Borough of Manhattan New York, N. Y. 10017
MU 7-8573

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

1000-Gilsts. JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

81A

Defendant's Memorandum in Opposition to

Motion to Disqualify with attachments

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

THE NCK ORGANIZATION, LTD.,
and WILLIAM E. GREENE, JR.,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant.

- x

74 CIV 776 (CBM)

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO MOTION TO DISQUALIFY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

THE NCK ORGANIZATION, LTD.,
and WILLIAM E. GREENE, JR.,

Plaintiffs, 74 Civ 776 (C.B.M.)

-against-

WALTER W. BREGMAN,

Defendant.

----------x

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO MOTION TO DISQUALIFY

Table of Contents

		Page
INTRODUCTION		1
PRECIS		2
I.	PLAINTIFFS' MOTION IS FRIVOLOUS AND MADE IN BAD FAITH	7
II.	THE LAW GOVERNING DISQUALIFICATION	10
III.	THE LAW, AS APPLICABLE, MANDATES DENIAL OF THE MOTION	14
	A. Weil, Lee & Bergin have not represented either plaintiff in any manner whatever.	14
	B. Randall cannot be disqualified, inasmuch as he does not represent Bregman here.	15
	B.1. Randall did not represent Org. as attorney with regard to the documents upon which this action turns.	16
	a. Standard Stockholders' Agreement ["SSA"] (Px 1, 2).	16
	b. Employment contract of June 17, 1970 (Px 3).	18
	c. Greene agreement and option (Px 9).	21
	B.2. Randall did not represent Org. with regard to matters collateral to this action.	23
	a. Bregman's stock purchases.	23
	b. The bank subordination agreements.	24
	c. Kaplan transactions.	24

Page

IV. PLAINTIFFS USE A VARIETY OF UNCONSCIONABLE TACTICS TO OBFUSCATE AND CLOUD THE ISSUES 27

A. Improper use of semantics, inaccurate and non-contextual references to the record. 27

B. Deliberate confusion of individual factual situations. 31

C. Continual insertion of issues unrelated to this motion. 35

CONCLUSION 37

NATURE OF THE ACTION

This is a simple breach of contract action in which Bregman claims to have an option from plaintiff Greene to purchase certain shares of stock in plaintiff Org. Greene refused to honor Bregman's exercise of this option, thus generating Bregman's counterclaim against him for damages resulting from Bregman's lost opportunity to resell them to Org. at a higher price under certain written contracts with it. (Bregman is not suing Org.)

NATURE OF THE MOTION

Plaintiffs move to disqualify Donald W. Randall and Weil, Lee & Bergin from representing Bregman as attorneys in this litigation.

PRECIS

I. Plaintiffs' Motion is Frivolous and Made in Bad Faith

Plaintiffs seek relief which they must know the court cannot grant. For one thing, Randall is not Bregman's attorney in this action, has neither retainer nor responsibility for representing him in it. The Bisco moving affidavit essentially admits this. Randall cannot be removed from a position he does not occupy (infra p. 7). For another, no case cited by plaintiffs, nor discovered by defendant, has disqualified the new attorney (i.e., Weil, Lee & Bergin). (For detailed discussion see infra pp.9,10-14).

Finally, as will be demonstrated in detail at pages 16-23 below, Randall did not -- as plaintiffs' moving affidavit virtually concedes and the record establishes beyond any reasonable doubt -- represent either plaintiff in an attorney's capacity with respect to the written instruments that, under the parol evidence rule, are the transactions which control the outcome of this litigation. (Indeed, defendant has moved for summary judgment based upon such documents. A copy of the motion, which has been adjourned pending outcome of the within motion, is appended hereto for the court's attention as Attachment A.)

Thus, plaintiffs make this motion knowing that there are no grounds upon which it should be granted, and, moreover, frequently misstate the record in a desperate attempt to manufacture a base for it (infra p. 27).

II. The Law Governing Disqualification

The law is that to be disqualified an attorney must represent a party adverse to his former client against that former client, in the same, or a closely related, transaction as in the former representation. (Infra pp. 10-14 .)

III. The Law as Applied Here Mandates Denial of the Motion

Randall does not represent Bregman as attorney in this action and did not represent or counsel either plaintiff in the matter being litigated, nor even in matters unrelated to the issues in this case but which plaintiffs invoke in their effort to confuse the true issues. Weil, Lee & Bergin, of course, never represented plaintiffs. As a matter of law, neither Randall nor Weil, Lee & Bergin occupy the dual position required for disqualification. (For a detailed discussion see p. 14 et seq., infra.)

IV. Plaintiffs Obfuscate and Cloud the Issues Actually Presented by This Motion.

Plaintiffs repeatedly misstate the record and take undue liberties with the testimony therein, and attempt to divert the court's attention from the issues presented on this

motion to areas immaterial to it and having no relevance to the merits of the case. These tactics betray the frivolity of this motion and plaintiffs' bad faith in making it. What is solely involved here is an attempted disqualification of defendant's counsel; other matters, even the merits of the parties' substantive positions, are of no relevance to this motion.

Plaintiffs' tactics, categorized, are:

A. Improper use of semantics, and improper citation of the record.

For example, the Bisco affidavit uses the word "prepared" in reference to Randall's activities concerning the June 17, 1970 agreement (Px 3). However, Randall explicitly qualified the sense in which he used that word to indicate his very limited role, not that of a legal representative or counselor, with regard to that document. The Bisco affidavit deliberately ignores Randall's qualification of that word in an attempt to give substance to this motion (see p. 28 infra). Further, the Bisco affidavit adverts to Randall's use of the term "co-counsel" as though it implied that Randall was vested with the responsibility of a lawyer engaged to represent defendant in this action. But, Randall's further testimony clearly shows that this was not the case (see p.30 infra).

As important as this refraining from candidly directing the court to the testimony as a whole, which would disclose its true meaning, is the moving affidavit's improper citation and misconstruction of the record. For example, in ¶14, it patently misquotes the record to make it appear that Randall testified that Weil was not oblivious to the ethical issue. In fact, however, the pronoun in the record is "I" (namely, Randall) and a portion of the testimony is omitted without any indication. Actually, Weil had inquired of Randall as to possible conflict of interest, and received thoroughly reassuring information (DWR Dep. pp. 273/19 - 274/24).[1]

This is only one of many such misstatements, designed to cast a pall of impropriety upon Weil, Randall or Weil, Lee & Bergin (see p. 27 et seq. infra).

B. Deliberate confusion of separate factual situations to infer impropriety, a tour de force of obfuscation.

---

[1] For purposes of brevity, deponents will be referred to by initials only: DWR (Donald W. Randall), WWB (Walter W. Bregman, defendant), NBN (Norman B. Norman, president of plaintiff Org.). Page references are to page/line, where that information is available in the deposition (e.g., DWR pp. 211/17 - 212/13 refers to page 211, line 17 through page 212 line 13).

For example, the Bisco affidavit commingles the Kaplan and Greene transactions to suggest that what limited acts Randall did perform regarding the Kaplan deal were, instead, connected with the Greene matter. They were not (see p. 31 infra).

The moving affidavit also deliberately confuses Randall's advice to Bregman in June 1973 in connection with one subject (his resignation) with that given in October 1973 concerning another (his involuntary termination) to make it appear that defendant's claim of privilege was improper and to misuse the Randall memo attached to the affidavit as Exhibit A (incompletely quoted as it is). (See p. 33 infra.)

C. Continual insertion of issues unrelated to this motion, which have no bearing on disqualification, and are not even related to the merits of the case.

For example, whether Randall, Norman and Winkler knew, remembered or forgot, or Randall concealed his knowledge of, the June 17, 1970 agreement (Px 3) has nothing to do with whether Randall previously represented either plaintiff as an attorney in the same transactions as are involved in this litigation, and whether he is now serving as an attorney representing defendant herein. (See p. 35 infra.)

DISCUSSION AND ANALYSIS

I. PLAINTIFFS' MOTION IS FRIVOLOUS AND MADE IN BAD FAITH

Plaintiffs' motion asks the court to perform an impossible task: to disqualify Randall from a position he does not occupy. The moving affidavit recognizes that Randall does not represent Bregman in this case (p. 9 infra), thereby bespeaking the frivolity and bad faith of this motion. (See Redd, p. 10 infra.)

Randall has no retainer and no responsibility in this action.

> "[Mr. Hafner] Q. Mr. Randall, were you retained by Mr. Bregman or Mr. Weil or the firm of Weil, Lee & Bergin as co-counsel in this action?
>
> A. No.
>
> Q. Were you engaged to represent Mr. Bregman in this action?
>
> A. No.
>
> Q. Do you have any responsibility for the strategy or handling of this lawsuit?
>
> A. No. "
>
> DWR Dep. pp. 280/23 - 281/8.

* * * * *

> "[Mr. Bisco] Q. You said at page 30 I might say co-counsel for Mr. Bregman which is the firm of Weil, Lee & Bergin and then you were asked who was the other counsel and you answered me. You were then asked when did you become counsel. 'Answer: On or about July 15, 1973'.

MR. WEIL: Obviously there was no such litigation in July of 1973.

A. So, therefore, -- then I will put it on the record just to make it clear -- when I used the term co-counsel in the previous testimony it was intended to mean only the fact that I have in the past since or subsequent to July 15, 1973 acted as counsel for Mr. Bregman on what you might call a personal basis in connection with certain matters and it was not intended to mean or imply that I mean co-counsel with the firm of Weil, Lee & Bergin in the pending litigation in connection with which this testimony is being given.

Q. Yet you advised with them often about the pending litigation, did you not?

A. No."

DWR Dep. pp. 211/17 - 212/13 (emphasis added).

* * * *

"A. Again, I will say Mr. Bregman from time to time during the period from -- certainly after July 15, 1973 up to about the end of 1973 called upon me from time to time for advice, legal advice, and counsel concerning various matters which I furnished to him. As I just testified there are no pending or outstanding matters as to which I am currently counseling Mr. Bregman on as attorney.

Q. Or currently counseling Mr. Weil or his firm?

A. I am not retained by Mr. Weil's firm. I have no fee arrangement with Mr. Weil. I am here pursuant to agreement simply to avoid the necessity of going through legal process to compel my being here as an accommodation to your firm and to the parties. However, I am here as a witness. My compensation for

participating in these proceedings is represented or has been and will be represented in each case by the sum of $32 for each such appearance which is the statutory witness fee and mileage."
DWR Dep. pp. 216/18-217/13 (emphasis added).

Randall does not occupy a dual position in this action as the above record shows.

Plaintiffs make no suggestion, nor can any be drawn from the record, that Weil, Lee & Bergin ever occupied any such position.

Plaintiffs' own acknowledgment, in the Bisco affidavit (¶13, p.10), that Randall was not engaged as counsel in this litigation bares the fatuousness of this motion.

It is clear on its face that plaintiffs' motion is a trifling one, made to delay consideration of defendant's long-standing motion for summary judgment and to vent the spleen of Org.'s "boss" and major proprietor (DWR Dep. pp. 113-114) against the disfavored Randall (DWR Dep. pp. 109-113). Beyond clutching at straws, plaintiffs undertake in this motion to manufacture them as well.

Further to the frivolousness of this motion, plaintiffs are undoubtedly aware that in no case cited by them nor discovered by defendant has the new attorney been disqualified, even where he was associated with an attorney who was disqualified due to a conflict of interest.

The courts take a very dim view of motions of this sort made without adequate factual basis (see Point II, infra), as can be seen in a recent case decided by the District Court of Utah. In Redd v. Shell Oil Co., 1974-2 T.C. ¶75,392 at p. 98,272 (D. Utah 1974) where an attorney, without adequate investigation of the facts as to opposing counsel's actual representation of the client, made a completely groundless and frivolous motion to disqualify opposing counsel based on affidavits entered by third parties in other unrelated actions, the court not only refused to disqualify but fined the moving attorney $5,000 for making such a motion. (For further discussion of Redd, see p.13 infra.)

Redd reflects that motions such as the one now before this court should not be lightly or irresponsibly made. They put more at stake than a defendant's right to counsel of his choice, as important as that may be. They charge attorneys with having acted improperly or in an unprofessional manner. Mere filing of such motions may subject accused lawyers to opprobrium.

II. THE LAW GOVERNING DISQUALIFICATION

To be disqualified for conflict of interest an attorney must represent a party adverse to his former client against that former client, in the same, or a closely related, transaction as was involved in the former representation. T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., et al., 113 F. Supp. 265 (S.D.N.Y. 1953).

> "[W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited". 113 F. Supp. at 268 (footnote omitted; emphasis supplied).

As shown below, neither prong of this bifurcated test is satisfied in the instant motion; disqualification is improper if not impossible.

The T. C. Theatre court disqualified an attorney (Cooke) retained by plaintiffs' attorneys of record. Cooke had previously represented defendant in an action brought by the government which raised the same issues as were involved in the later private treble damage action. A second motion was made to disqualify Kahan, trial counsel in the private action. He had also represented Cooke in an action for fees due on the prior government suit (idem at 271). The court refused to disqualify Kahan; it would not infer, without proof, any disclosure to Kahan of confidential information that might have been learned by Cooke in the earlier action:

> "The Court is not required to indulge in any presumption that Cooke has divulged confidences reposed in him by his former client simply because he is now engaged in a law suit with them. The presumption would be to the contrary. There is even less basis for the claim against Messrs. Garfinkle & Adler. Movant again presses upon the Court a "presumption" that they must have retained Cooke in order to make use of confidential information he received in the course of his former employment. It's not clear why it should presume the attorneys have acted unethically. On the contrary,

> I would presume that Messrs. Garfinkle & Adler had no such motivation." Idem at 272.

T. C. Theatres holds, then, that even an attorney who has been associated with a disqualifiable attorney will not, without more, be reached by any taint of improper representation.

Defendant's description of the delimited scope of disqualification is also supported by Cord v. Smith, 338 F.2d 576 (9th Cir., 1964), and American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir., 1971). In Cord, the court disqualified an attorney (Young) from further representing Smith (plaintiff-appellee) because Young had formerly represented Cord (defendant-appellant) in the same matters as those being litigated. However, the court did not disqualify Murray, who had "already been associated as attorney some time ago in this proceeding here". Idem at 520. Rather, the court expressly allowed him to continue representing Smith.

This rule, that the disability does not reach beyond the attorney who has actually engaged in both representations, or his partners, was also followed in American Can Co., supra.

> "To substantiate a motion for disqualification, the movant must first show an attorney-client relationship exists or existed. Once this is shown, liability to disqualification extends to partners and employees, of that lawyer who participated in the attorney-client relationship. Idem at 1129 (emphasis supplied).

American Can had retained two firms as co-counsel. Both were employed by, paid by and responsible to it. Ericson, a partner in one firm, had represented defendants in unrelated tax matters and appeared in the instant action "of counsel". The court disqualified him, his partner (Allison) and their firm from representing plaintiff; the Allison disqualification was based on knowledge imputed to him from Ericson. The court, however, would not take the next step and apply an "imputation-on-an-imputation" to the firm which was co-counsel or to Miller, one of its partners.

> "Carriage of this imputation-on-an-imputation to its logical terminus could lead to extreme results in no way required to maintain public confidence in the bar.... Ultimately all counsel for the parties in the present suit could be disqualified....Such a rule would be unsound logically and indefensible practically."
> Idem at 1129.

Finally, Redd, supra p. 10, expresses the attitude of courts when faced with motions of this type, which must, of necessity cast professional aspersions upon the accused attorneys.

In Redd the court refused to disqualify an attorney, and the firm with which he was associated, from representing plaintiff. The attorney, Burbidge, had previously been associated with one of Shell's attorneys, the firm having represented Shell in other similar actions. The firm's activities notwithstanding, the court found that Burbidge's representation of Shell was limited to four instances, in none of which were the issues raised similar to those posed

by the current case. In refusing to disqualify, even though Burbidge had actually earlier represented Shell, the court held that the prior representation was not substantially related to the instant action, the keystone of this rule of law (see conclusion of law ¶6 at p. 98276, idem). The court also found an inadequate factual foundation for purposes of the motion:

> "The rule of T. C. Theatre Corp. only sanctions disqualification of an attorney for prior representation of an adverse party when the disqualification is based upon an adequate evidentiary foundation. It does not permit disqualification based upon speculation or suspicion that confidential information may have been obtained during the course of a young lawyer's association with a large firm. Attorneys are not presumed to behave unethically." Idem p. 98278.

The court fined moving counsel $5,000 and ordered the decision separately indexed under his name saying:

> "[Plaintiffs' counsel] wilfully sponsored a meritless and untimely motion for disqualification of his adversary's counsel. The filing of a motion for disqualification drawing into question the ethical propriety of an adversary's conduct without adequate foundation is itself improper." Idem p. 98279.

III. THE LAW, AS APPLICABLE, MANDATES DENIAL OF THE MOTION

Applying the law to the facts, as they appear on the record, Weil, Lee & Bergin cannot be disqualified. Neither can Randall.

A. Weil, Lee & Bergin have not represented either plaintiff in any manner whatever, and plaintiffs do not suggest any such representation. Disqualification

as to Weil, Lee & Bergin cannot stand on any dual representation basis. The requisite evidentiary basis (Redd, T. C. Theatres, supra) is also lacking, for there is no suggestion that Weil, Lee & Bergin received any confidential information whatever from Randall. In fact, Randall did not possess any information of a confidential nature which would have been, or in fact was, unknown to Bregman. (Infra pp. 16, 19.)

B. Randall cannot be disqualified, inasmuch as he does not represent Bregman here (supra p. 7, et seq.). Moreover, even assuming, arguendo, that he were Bregman's lawyer, retained in this litigation, he does not meet the further required test that he have formerly represented a plaintiff as an attorney, or have exercised "counselship" to either of them, as the Bisco affidavit puts it (¶2, p. 2, and ¶10, p. 7), in the matter under consideration or one substantially related to it. This case deals only with Bregman's right to exercise the Greene option and to resell the shares thus purchased to Org. at book value upon the termination of his employment by Org. Randall did not represent or counsel Org. as to either the Greene option, or even the unrelated Kaplan stock sales plaintiffs introduce (pp. 21, 24 infra). Neither did Randall represent or counsel either plaintiff as a lawyer in connection with Bregman's employment contract of June 17, 1970, or the provisions of the Standard Stockholders' Agreement of October 25, 1967 which the June 17, 1970 agreement incorporated into itself by reference (p. 16 et seq., infra).

It was Frederick E. Winkler, Esq. who was Org.'s counsel regarding the Kaplan and Greene transactions (Bisco affidavit, ¶4, p. 3, ¶5, p. 5).

B.1. Randall did not represent Org. as attorney with regard to the documents upon which this action turns

As defendant's pending motion for summary judgment (Attachment A hereto) amply demonstrates, this case turns on the legal effect of a contractual trilogy: Bregman's Standard Stockholders' Agreement (Px 1, 2); Bregman's employment contract of June 17, 1970 (Px 3); and, the agreement between Greene and Org. granting Bregman an option to purchase 5,000 shares of Org. stock.

As we shall now show, Mr. Randall did not represent, negotiate, render legal advice to or act in his capacity as counsel for Org. with regard to any of them. Therefore, in this matter, he could not now be improperly taking an adverse position against Org. with respect to them.

a. Standard Stockholders' Agreement ["SSA"] (Px 1, 2)

The form SSA executed by Bregman and other employees was in use before Randall was hired and was neither drafted nor prepared by him (DWR Dep. p. 233); he was not asked to render any legal advice to Org. with regard to them (DWR Dep. pp. 233, 238, 239) and did not negotiate for, consult with or receive any confidential information regarding them from Org.[2] (DWR Dep. pp. 234, 239).

---

2 Further, he was not involved, as a lawyer, in the ancillary documents which accompanied the execution of the SSAs, (infra p. 24).

"Q Mr. Randall, I refer you to the standard stockholders' agreement signed by Mr. Bregman and previously identified as Plaintiffs' Exhibit I. Would you take a look at that and refresh your recollection as to it. Did you render any legal advice to NCK with regard to this document?

"A I think I have testified before to some extent on this point but again to sum it up. The document which is marked as Plaintiffs' Exhibit I is a copy of a four-page printed form which bears the title 'Stockholders' Agreement.' This form of agreement was being used when I joined the company in 1967 as the basic agreement between the company and each individual who purchased the shares of the company. It is my understanding based on knowledge that I acquired while I was employed by NCK and was performing the functions of Secretary and/or house counsel that this form of agreement had been in effect and had been used for this purpose for at least several years prior to 1967 substantially in this exact form.

"Q Did you draft it?

"A Obviously I did not draft it because as I said it had been in effect in this form for a number of years.

"Q Did you render any legal advice to NCK with regard to the transaction shown in that document? In other words, the transaction between NCK and Mr. Bregman.

"A Let me see if I understand you. The document which has been marked Plaintiffs' Exhibit I is an agreement covering -- and I think there is adequate testimony in the record on this -- covering a purchase of shares of stock what was then Norman, Craig & Kummel, Inc. by Mr. Bregman and I think I already testified that in view of the date of this document, which is October 25, 1967, I have no recollection of having been involved in the transaction at all.

"Q So the answer to my question is?

"A The answer to your question is no.

"Q Did you negotiate in any way for NCK with Mr. Bregman with regard to this transaction?

"A No.

"Q Did you represent NCK in any manner with regard to this transaction as an attorney?

"A No.

"Q Do you know who did?

"A I think we ought to make it clear that having reduced the terms and conditions of the holding of shares as between the company and individual shareholders to a printed form, it became essentially unnecessary for anyone to function in a role of attorney with regard to each of these succeeding transactions."

DWR Dep. pp. 232/10 - 234/14.

Randall's testimony also clearly shows that prior to his employment, employee share purchases had been handled by Roselou Flanagan, a non-lawyer employee of Org. (DWR Dep. pp. 16/19 - 17/5 and 71/5 - 71/17.)

With regard to the SSAs, then, Randall was not representing Org. as a lawyer. Indeed, they presented no necessity for legal representation, having been reduced to a "fill-in-the-blanks", garden variety, printed form agreement. Randall would not occupy a dual position as to the SSAs.

b. Employment contract of June 17, 1970 (Px 3)

Prior to his transfer to New York, while Mr. Bregman was in charge of NCK's European operations based in London, he negotiated with B. David Kaplan (a non-lawyer) the terms of his transfer and eventual assumption of the presidency of the New York company. The negotiations, which took place on the continent, were memorialized in a letter (Dx 9) written by Bregman (WWB Dep. p. 38/10-14) and sent to Kaplan.

(DWR Dep. pp. 240, 241) which formed the basis for the formal employment contract (Px 3).

> "... The draft that I wrote was based in turn on a written memorandum or letter from Mr. Bregman to Mr. Kaplan in which Mr. Bregman set out the terms of the agreement that had been reached between him and Mr. Kaplan concerning his coming back to New York from his post in London and the various details in connection with that transfer. On the basis of that document I prepared a draft and I think it is fair to say that the -- that Plaintiffs' Exhibit 3 is substantially in the form of my draft."
>
> DWR Dep. pp. 241/2-11.

* * * *

> "A ... [Plaintiffs' Exhibit 3] was prepared -- was written, typewritten, at the direction of Mr. Bregman and Mr. Kaplan, and when it was completed in this form, to the best of my recollection, the -- one or more copies were delivered to Mr. Kaplan who, again, as I recall undertook to have the document executed by himself and Mr. Bregman."
>
> DWR Dep. p. 7/10-16.

* * * *

> "A It is my recollection that a signed copy of this document was returned to me in due course, whenever that was, and I placed that copy in the files which I maintained of similar agreements."
>
> DWR Dep. pp. 8/23 - 9/2

Randall took no part in the negotiations leading up to that contract (DWR Dep. p. 241/21) and received no confidential information regarding it which was unknown to Bregman. (Ibid.) The operative portions of both Px 3 and Dx 9, insofar as this action is concerned, are substantially identical:

> "Q Defendant's Exhibit 9C, the paragraph on that page, page 3 of that document, numbered 4A. Would you read that, please.

"A I think we have to back up to the language that leads into paragraph 4A. The gist of which is that Mr. Bregman is saying that certain changes ought to be made and I will quote. 'In the unlikely event that you wish to sever my relations with the company or remove me from the position of CEO. This should include A: Payment in full on all my shares owned at the time without regard to the three year vesting period described in the current stockholders' agreement. '

"Q Mr. Randall, what do you understand the initials CEO to mean?

"A I think it is clear from the context of Mr. Bregman's letter that CEO means Chief Executive Officer.

"Q What did you do or what was the outcome of that particular passage of Mr. Bregman's letter, Defendant's Exhibit 9C?

"A Referring now to Plaintiffs' Exhibit 3, paragraph 8, the provision that has just been quoted from Mr. Bregman's letter, is reflected in Plaintiffs' Exhibit 3 in the following language: 'If your employment is terminated by NCK, all shares of the capital stock of NCK then owned by you will be repurchased in accordance with the second part of paragraph 3 (If the Stockholder (i) should at any time die:) of the Stockholders' Agreement dated October 25, 1967 between you and NCK, without regard to the length of time you have held such shares. Your Stockholders' Agreement is hereby amended accordingly. '

"Q Mr. Randall, I will refer you to page 4 of Mr. Bregman's letter of January 1, 1970 which has been identified as Defendant's Exhibit 9D and I would like you to read that subparagraph numbered 5B on that page for the record, please.

"A Paragraph 5B reads as follows: 'Under the current stockholders' agreement, I believe my pay back upon termination can be limited to $20,000 per year and 4% interest on the unpaid balances. Obviously this is unreasonable in today's money market. I suggest a program of

payment in equal fifths (20% per year) with average yearly bank rate interest paid on the unpaid balances. '

"Q As to that specific passage of Mr. Bregman's letter, what did you do or how was that provided for in the June 1970 agreement?

"A Referring to Plaintiffs' Exhibit 3, paragraph 9, the language that I have just read from Mr. Bregman's letter is incorporated in that document as follows: 'If your employment with NCK is terminated for any reason, either by you or by NCK, payment for the shares of capital stock of NCK repurchased from you will be made in five equal annual installments. The first such installment will be paid at the closing and the remaining installments at yearly interest intervals thereafter, with interest from the closing date at a rate equal to the average prime rate charged during the period by the principal New York banker of NCK. Paragraph 5 of the Stockholders' Agreement dated October 25, 1967 between you and NCK is hereby amended accordingly. '

DWR Dep. pp. 248/12 - 250/25.

Randall modified the language in Dx 9 to put it in more readable form at the express direction of Kaplan (DWR Dep. pp. 7, 246).

c. Greene agreement and option (Px 9)

The Greene agreement was drafted by Mr. Winkler (DWR Dep. pp. 62, 138) whose firm was Org.'s attorney with regard to it and the related and underlying transactions. (Bisco Affidavit ¶4, p. 3; ¶5, p. 5) It was Winkler who "worked out the details" of the Greene deal (NBN Dep. p. 19).

Randall was not acting as Org.'s lawyer with regard to the option agreement; he merely suggested several

changes with respect to it in his capacity as a financial officer of Org. (DWR Dep. pp. 4, 228, 229). [Mr. Norman relied rather heavily on Randall's financial expertise. (NBN Dep. p. 16)] For example, Randall suggested that the effect of Org.'s current position on repurchases be expressed as a ratio of current assets to current liabilities, rather than in dollar terms and that the determination of the current ratio be accomplished through Org.'s regular internal audit procedures (Px 29A, p. 3).

His limited, and certainly non-lawyer, role is reflected in the language of Winkler's transmittal letter of August 25, 1974 (Px 12) which asks no advice, refers to no consultation, and raises no legal issues. Randall was merely sent the documents as a custodian after the deal had been made: "Here are copies..." (Px 12). In contrast, however, as can be seen in Winkler's September 8, 1972 transmittal letter to Beresford (Px 10), Winkler clearly casts himself alone in the role of attorney: "I have prepared ... I have eliminated ... I have retained ..." and seeks the advice of only Beresford, a non-lawyer, "... please look this over and let me have your comments." (Emphasis added).

As shown above, Randall was not acting as attorney for Org. with regard to any of the documents upon which this action turns.

Beyond that, what trivial contacts he might have had, here and there, with them were so polar in nature to the highly responsible and important exercises of judgment,

negotiation, and corporate decision making for which Cord relied upon Young (see 338 F.2d at 522, 523) as to make the excerpt from Cord quoted at the end of plaintiffs' memorandum of law grossly inapposite to the Randall type and level of activity (what there was of it) relied upon by plaintiffs to support the within motion.

B.2. Randall did not represent Org. with regard to matters immaterial to this action

In the course of taking depositions, plaintiffs have introduced a great number of documents which have no bearing on the outcome of this case, and which can serve only to obscure the issues truly involved here. (See, Point IV (c) p. 35 infra.) For example, there is no question that the "Major Shareholders" were required to subordinate their re-purchase rights to the Chemical Bank and Chase Manhattan, but this would in no way affect Bregman's present rights in the Greene shares. Similarly, there is no dispute that Kaplan sold his interest in Org. and that the largest part of the shares representing that interest was purchased by Greene; and there is no controversy here over the transaction by which that transfer was effected (i.e., Px 9).

These collateral documents may be conveniently divided into three groups: (a) those dealing with various of Bregman's stock purchases, (b) those dealing with the bank loans, and (c) those concerning Kaplan's sale of shares to NCK employees (not including Bregman) and to Greene.

a. Bregman's stock purchases

Despite their irrelevance for purposes of this action, plaintiffs have introduced a number of documents

relating to Bregman's original stock purchases (Px 13-23). Randall did not draft these papers (see, e.g., DWR Dep. p. 72). His only function was to transmit the later of them to Bregman for his records (DWR Dep. p. 88);[4] see, also, p. 16 supra.

b. The bank subordination agreements

These documents (Px 7, 8) subordinate the Major Shareholders' rights to those of the two banks which lent Org. substantial sums of money. Bregman was a signatory, but since the loans have been satisfied, the agreements can have no effect here. (DWR Dep. p. 92.)

Randall's role regarding the Chemical loan was a limited one and could be said to be secondary to that of the bank's attorneys (DWR Dep. p. 98, Px 4) and he was not in any way involved in the Chase Subordination Agreement (DWR Dep. p. 106, Px 8). His only contact with Bregman regarding them was to transmit Px 7 to him. (Px 25, DWR Dep. p. 107.)

c. Kaplan transactions

The Kaplan shares were purchased by Greene, Roncarelli, Myers, Beresford, Norman, and possibly Maas. Mr. Bregman, unwilling to commit any funds to the purchase of

---

[4] Px 13 (p. 67), Px 14 (p. 69), Px 15 (p. 78), Px 16 (p. 79), Px 17 (p. 83), Px 18 (p. 84), Px 19 (p. 85), Px 20 (p. 86), Px 21 (p. 87).

these shares, declined their offer to him (WWB Dep. pp. 19, 20, 24). In the course of these transactions, the preparation of the documents relating to them fell, as Mr. Bisco clearly says in his affidavit, to Mr. Winkler and the non-legal functions were performed by Mr. Beresford. (DWR Dep. p. 161, Bisco affidavit, ¶4, p. 3, ¶5, p. 5.)

Beresford, who was responsible for "expediting" the purchase of these shares by his fellow employees, was not entitled, according to the bylaws of NCK, to sign the agreements on behalf of the corporation, since his position,"Chairman of the Executive Committee", was not one authorized by the bylaws (DWR Dep. p. 261). As Randall testified, he signed these documents as Vice-President as a result of that situation at the request of Mr. Beresford, whose office adjoined his own (Px 27, DWR Dep. p. 262).

Winkler, who was "handling the details" (NBN Dep. p. 19), did not ask Randall's advice or counsel regarding these documents, but merely transmitted them to him for safekeeping.

Randall, upon receiving Winkler's draft (Px 28), modified it to make it more readable and understandable (DWR Dep. p. 267). This exercise by Randall was an application of his writing rather than his legal skills:

"... I think it is a fair characterization of the changes to say that they are either editorial, they are you might even say in some situations aesthetic. They are not subject to someone pointing out something to the contrary -- they do not in any respect change nor were they intended to change the substance of the document, and I think if we were to go through these changes line by line we would see that they do not change the substance of the document. To illustrate that point, I would only or I would refer to the final paragraph of the document numbered 2 in which the entire language is changed and there is virtually no word that is the same in the same place and yet the gist of those two paragraphs in my judgment is identical. It so happens that I sharpened up my editorial pencil, and I took some liberties with Plaintiffs' Exhibit 28 and made a lot of changes of that nature which I thought were improvements.

"MR. BISCO: More aesthetic?

"A Aesthetic. Editorial --

"MR. BISCO: What do you mean by editorial?

"A For the sense of clarity, consistency and all that. As I say -- "

* * * *

"MR. BISCO: You made those changes out of your legal training and your aesthetic considerations.

"A I don't know that my legal training had anything to do with it. I made the changes because I thought the language of the document as first written was not as clear and concise as it could be and, therefore, since I probably did not have anything else to do that afternoon, I decided to neaten it up a bit."

(DWR Dep. pp. 266/24-267/22, 268/9-17.)

After the documents had been prepared, Randall represented the individual purchasers at the closing and sent to them the documents that were executed (Px 36-40).

The character of this individual representation can be seen in the language of the various documents to Roncarelli, Myers and Beresford: "I delivered on your behalf ...." (Px 34, 36, 40). Moreover, the memoranda between Randall and Roncarelli dealing with the Kaplan transaction clearly show that Randall's involvement as far as Org. was concerned was minimal (DWR Dep. p. 155) and that he was acting merely as a conduit for the information to be passed on from Mr. Norman to Roncarelli (Px 37-39).

Although Randall did raise certain questions regarding the stock transfer tax payable upon the transfer of the shares, there is no more relationship between that tax transaction and the matters involved in this suit than there is regarding the Kaplan sales of shares, in which Bregman did not participate and which are not in issue in this action.

IV. PLAINTIFFS USE A VARIETY OF UNCONSCIONABLE TACTICS TO OBFUSCATE AND CLOUD THE ISSUES

A. Improper use of semantics, inaccurate and non-contextual references to the record

One of the tactics of the moving affidavit is to ignore the tenor and sense in which certain words clearly

were used in depositions, and to favor the court with only those portions of the transcript which, standing alone, might bolster plaintiffs' motion. But they have been taken out of the context within which they have quite a different meaning.

For example:

Paragraph 3 of the moving affidavit states, "The turning point of this case really depends upon an agreement dated June 17, 1970 which was prepared by the witness Randall and a copy of which is annexed to the complaint herein as Exhibit B". It uses the term "prepared" without any further qualification or explanation, to imply that Randall had admitted preparing the document as a lawyer representing Org. in the transaction. Randall, however, had made thoroughly clear what he actually meant.

> "A The document in question was prepared -- was written, typewritten, at the direction of Mr. Bregman and Mr. Kaplan, and when it was completed in this form, to the best of my recollection, the -- one or more copies were delivered to Mr. Kaplan who, again, as I recall undertook to have the document executed by himself and Mr. Bregman."
> (DWR Dep. p. 7/10-16.)

Later, Randall again explained his use of the word as follows:

> "Whether I prepared this specific document, prepared in the sense of having it typed or otherwise had anything to do with it, I really don't know at this point."
> (DWR Dep. p. 70/6-9.)

"Q And would you normally prepare documents like that?"

"MR. WEIL: Are you using the word prepare in a sense that the witness just explained his understanding of it, Mr. Bisco?"

"MR. BISCO: Yes."

(DWR Dep. p. 70/20-25.)

Further:

"MR. WEIL: Again, Mr. Bisco, you are using the word prepared in the sense that the witness has previously explained, is that correct?"

"MR. BISCO: Yes, I am satisfied if he says he typed it, he dictated it and it was prepared."

"MR. WEIL: Without drafting the language."

"[Randall]: "A But I have not, in my testimony at least this morning, used the word 'dictated' anywhere."

"Q When I say prepared, what do you understand by it? Maybe I will be satisfied with that."

"A We did, or you asked me a question which I understood to mean did I draft, in the way in which the word draft would be used by a lawyer, did I draft the exhibit which was previously marked as No. 14. And I told you that <u>I was certain that I had not drafted that document</u>."

"Q Well, suppose I ask you if you have --"

"A If you ask me if I drafted this document I will tell you that I am certain <u>I did not draft</u> this document."

<u>Idem</u> pp. 76/15 - 77/11
(emphasis added).

Thus, the very document upon which, plaintiffs concede, this case depends as its turning point was not the product of a lawyer representing or counseling a client, but of a scribe carrying out the substantive directions given him by Kaplan (a layman) and originated by Bregman himself (supra pp. 18-21). The moving affidavit's effort to disguise that fact by misciting and playing upon the word "prepared" is shoddy and futile.

As a second example of misuse and misconstruction of terms, reference is made to paragraph 1 of the Bisco affidavit, stating: "He tried to explain what he meant before by using the term 'co-counsel' (210-212). He had said at page 30 that he was 'co-counsel for Mr. Bregman' with the firm of Weil, Lee & Bergin and that he became counsel on or about July 15, 1973 which was the exact date of his termination of employment with Organization (30-31)."

Randall, as pointed out above (supra p. 7 et. seq.), has no retainer nor responsibility and is not "co-counsel"with the firm of Weil, Lee & Bergin. Randall unmistakably explained his use of that term (supra p. 8), and it in no manner justifies the inference from it that the Bisco affidavit seeks to foist upon the court.

Randall did not testify, as the Bisco affidavit would have it, that he had participated in discussions as co-counsel with Weil. Lee & Bergin representing defendant in the declaratory judgment action. He was Mr. Bregman's personal attorney and, as one of two lawyers present at the meeting, each representing Bregman, albeit in different capacities, his use of the term "co-counsel" was accurate, but not supportive of plaintiffs' version of it.

B. Deliberate confusion of individual factual situations

The Bisco affidavit confuses and conglomerates separate and distinct factual situations in an attempt to make the irrelevant appear relevant.

For example, it fuses the Kaplan transactions, the sale of his shares by David Kaplan to key employees of NCK (but not to Bregman) and to Greene, with the granting by Greene of an option for the purchase of his shares to certain key employees of NCK (including Bregman), implying that the two are indeed one transaction (Bisco affidavit ¶4). This is not the case. Bregman did not purchase any Kaplan shares but did exercise his rights under the Greene option. The two transactions were separate and distinct, the first having no bearing upon the controversies that are the subject of the present litigation.

Plaintiffs, by deliberately trying to commingle the two, would make it seem that Randall acting with regard to the Kaplan deal thereby so acted in the Greene option deal.

The Bisco affidavit also attempts to turn Randall's signing certain papers connected with the purchase of Kaplan shares by some NCK employees (but not Bregman) as "Vice-President" into an act of representation as an attorney. This falls short in two respects. First, although Randall signed as "Vice-President", the record is clear that 1) he held vice-presidencies in fields not only of law but of finance and of administration as well (DWR Dep. pp. 3-4), and 2) he did not act or sign as NCK's lawyer, but solely in an administrative capacity; specifically, Beresford, who was not a lawyer, would have been the signatory except for one reason,-- he did not hold an officially authorized corporate title (DWR Dep. p. 261).

Secondly, even had Randall in fact been engaged as NCK's counsel in those Kaplan stock sales, they would have no bearing whatsoever on this motion, as they are not matters in litigation herein and cannot support plaintiffs' pretense that Randall engages in a duality of professional representations.

A second example of deliberate confusion and clear misstatement of the record is in paragraph 13 of the moving affidavit which attempts to cast Randall in the role of one who deliberately falsified his testimony. To the contrary, however, Randall's testimony was scrupulously true and not internally inconsistent. The so-called contrasts plaintiffs try to conjure up in Randall's testimony are accounted for by the fact that Randall had been referring to two separate consultations with Bregman rather than one. They dealt with distinctly different questions: One, in July, 1973, as to Bregman's rights if he were to resign; the other in October, 1973, as to his rights after he had been discharged.

Randall's written memorandum, attached as Exhibit A to the Bisco affidavit, relates only to the former. Notably, the Bisco affidavit does not include the written question propounded by Bregman to Randall in July of 1973 which clearly indicates that fact. (Attachment B hereto).

It is this July 1973 discussion, dealing with resignation, to which Bregman referred during his testimony and as to which counsel agreed there had been a partial waiver (WWB Dep. pp. 28, 52). The Bisco affidavit, however, deliberately mixes up Randall's July written memorandum with the oral opinion he gave during October 1973 in a meeting in Randall's house with Bregman and Myers <u>after Bregman had been fired</u>. It was not within the attorney-client privilege due to Mr. Myers' presence (DWR Dep. pp. 288/17 - 291/9).

Randall was making a proper distinction between the July and October consultations which plaintiffs' attorney chooses to ignore for his own purposes; namely, to make it appear that Randall, in response to a question of Bregman regarding his exercise of the Greene options after his involuntary termination, reached the conclusion that it was a "dubious undertaking" (Bisco affidavit ¶15, p. 11). In fact, however, Randall had asserted that conclusion based on the earlier consultation where the question was whether the option could be exercised and the stock resold to Org. at book value on or before resignation.

Inarguably, plaintiffs' counsel was thoroughly aware of this difference, and of its importance; hence, of the misleading that could attend the confusion generated by paragraph 13 of his affidavit. By his own characterization in his paragraph 3, "The turning point of this case really turns upon an agreement dated June 17, 1970...". What he refers to is that Bregman's right to resell the Greene option shares to Org. at book value without a three-year waiting period is governed by paragraph 8 of that contract, which was to be effective only if Bregman was discharged, not if he resigned.

All of this was fully ventilated with plaintiffs' attorney and, as his above-quoted statement shows, completely understood and recognized by him (DWR Dep. pp. 287/2 - 290/20).

A third, blatant example of the moving affidavit's penchant for distortion, if not misrepresentation, of the

record looms at paragraph 14, page 10 where it misquotes Randall grievously so as to make it appear that he was testifying that "Mr. Weil" was not oblivious to the question of conflict of interest. What the Bisco affidavit misrepresents as a direct quotation from Randall, "It was not that he [Mr. Weil] was oblivious..." actually was, "It was not that I [Randall] was oblivious...".

The transparent purpose of the tactic is, of course, to try to circumvent the established principle against disqualifying a new attorney (supra pp.10-14).

C. Continual insertion of issues unrelated to this motion

Plaintiffs insert in this, and practically all their other pleadings, a mass of extraneous and unrelated matters which have no bearing on the outcome of either this motion or the case as a whole.

For example, in paragraph 4 at page 3, the Bisco affidavit asserts that Randall's testimony leaves considerable doubt whether Randall, Norman and Winkler had forgotten the provisions of the June 17, 1970 agreement.

Whether they, or any of them, knew, remembered, failed to remember, did not recall or did not think about Bregman's 1970 employment contract, has no relevancy to this motion. All the court is to deal with here is the question: Did Randall and/or Weil, Lee & Bergin act properly or improperly in this matter insofar as conflict of interest, or duality of representation, is concerned?

A second example is the inclusion on page 3 of the Bisco affidavit of statements purporting to outline the rights and obligations of third persons regarding their purchases of Kaplan shares. Whatever rights these persons have is of no moment here. For that matter, neither are the rights or obligations of Greene with regard to the resale of the Kaplan shares to Org.

These ruminations in the moving affidavit are meant to cloud the true issue presented, and to suggest to the court that Bregman should not prevail on the merits of this case. However, whether Bregman will ultimately be successful should not and must not have any relation to the outcome of this motion. In any event, if plaintiffs wish to test his probability of success, they need only answer defendant's motion for summary judgment on file since October 4, 1974.

If any more were needed to uncloak plaintiffs' deliberate and knowing, hence bad faith, tactics to confuse and obfuscate by dragging in false issues, it will be found in paragraph 10, page 7, which tries to provoke an inference that Bregman had signed an agreement which in fact he did not sign, -- this despite the fact that the complaint itself explicitly alleges he did not sign it, and that plaintiffs' counsel conceded during the Randall deposition he does not claim that Bregman had done so! (DWR Dep. pp. 217-220).

CONCLUSION

Not only

1) should plaintiffs' motion be denied but, considering

a.) its insubstantiality and their irresponsibility in bringing it, further betrayed and augmented

b.) by their deliberate and knowing distortions, if not misrepresentations, of the record - both tacit and express -, and

c.) their efforts to confuse and obfuscate the true issues by cramming their motion papers with patently immaterial and irrelevant matter; and considering, further,

d.) that they have so acted with respect to a motion that requires the utmost by way of good faith and responsibility because of its tendency and capacity to besmirch the good name of reputable attorneys,

2) the defendant should be awarded his costs, including reasonable attorneys' fees, in connection with the motion.

Dated: New York, New York
January 24, 1975

Respectfully submitted,
WEIL, LEE & BERGIN

By _____
Gilbert H. Weil
Attorneys for Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs

-against-

74 Civ 776 (C.B.M.)

WALTER W. BREGMAN,

Defendant.

- -x

DEFENDANT'S MEMORANDUM IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT

ATTACHMENT
A

LAW OFFICES OF
WEIL, LEE & BERGIN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs,

-against- 74 Civ 776 (C.B.M.)

WALTER W. BREGMAN,

Defendant.

- x

DEFENDANT'S MEMORANDUM IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT

Motion

Defendant, Bregman, moves for summary judgment as to both the complaint herein and his counterclaim.

Nature of Action

The controversy is over Bregman's contract rights against plaintiffs.

Bregman contends that by written contract of August 31, 1972 he enjoyed an option, which he later duly asserted only to have it repudiated, to purchase from plaintiff Greene 5,000 shares of stock of the corporate plaintiff (ORG) at $5.47 per share. Bregman further asserts that

written contracts of June 17, 1970 and October 25, 1967 obligated ORG to repurchase those same shares from him at their book value as of December 31, 1973, an amount more than double his purchase price.

Plaintiffs, maintaining that ORG was bound to repurchase the shares at only $5.47 each, conspired to have Greene refuse Bregman's exercise of his option, and instituted their within action for a declaration of the parties' rights in the situation as plaintiffs see them.

Bregman has counterclaimed for the damages caused him by plaintiffs' breaches of their respective contracts, and for declaratory judgment in his own favor.

Theory of Motion

Bregman's rights are established by three contracts (October 25, 1967, as amended by and incorporated by reference into June 17, 1970; and August 31, 1972). Each is in writing; each is clear, unambiguous, and complete upon its face; and each is conceded by all parties as to its existence. Thus, under the governance of the parol evidence rule, and absent even an allegation that Bregman entered into any later contract, supported by adequate consideration, to alter said earlier agreements, there can be no triable issue of fact as to the nature of the parties' rights and obligations.

The Facts

1970 Employment Contract

Bregman's rights are established by a clear, unequivocal, complete contract of employment between him and plaintiff ORC's predecessor, Norman Craig & Kummel, Inc. (Compl. ¶3), dated June 17, 1970 and annexed to the complaint as Exhibit B. It plainly sets out the respective obligations of Bregman and ORC, reading, in pertinent part (with emphasis added):

> 8. If your employment is terminated by NCK, all shares of the capital stock of NCK then owned by you will be repurchased in accordance with the second part of paragraph 3 (beginning "If the stockholder (i) should at any time die ...") of the Stockholders' Agreement dated October 25, 1967 between you and NCK, without regard to the length of time you have held such shares. Your Stockholders' Agreement is hereby amended accordingly.
>
> 9. If your employment with NCK is terminated for any reason, either by you or by NCK, payment for the shares of capital stock of NCK repurchased from you will be made in five equal annual installments. The first such installment will be paid at the closing and the remaining installments at yearly intervals thereafter, with interest from the closing date at a rate equal to the average prime rate charged during the period by the principal New York banker of NCK. Paragraph 5 of the Stockholders' Agreement dated October 25, 1967 between you and NCK is hereby amended accordingly.

This 1970 contract, then, calls for ORG's repurchase of all of Bregman's shares in the manner provided in the Standard Stockholders' Agreement (SSA) of October 25, 1967, but with two explicit, clear and unambiguous exceptions. The first waives the standard three-year holding period otherwise required by the SSA. The second, not disputed, mandates interest payable at prime rate on unpaid installments.

SSA of October 25, 1967

There is no controversy over the provisions of this SSA, which, with the amendments quoted above, are incorporated by reference into Bregman's June 17, 1970 employment contract. The SSA has been marked in its entirety as plaintiffs' Exhibit 1 to the Bregman deposition of May 24, 1974 (B. Dep.), and as defendant's Exhibit 6 A-D to the deposition of ORG by its president and chief executive officer, Norman B. Norman, of July 2, 1974 and July 9, 1974 (N. Dep.).[1] It is also alleged in paragraph 8 of the complaint to be in the same form as Exhibit A to the complaint.[2] The pertinent language from paragraphs 3 and 5 of that SSA, referred to in the portions quoted above from the 1970 employment contract, read respectively, as follows:

---

1. Bregman was deposed by plaintiffs; ORG, through Norman, by defendant.

2. See footnote 9, infra.

> [3]...should the Stockholder more than 36 months from the date of the subscription for shares held by Stockholder... cease to be in the employ of Corporation for any reason the purchase price of such shares shall be determined as follows: (aa) The base price shall be the book value of such shares at December 31st prior to the date of the offer made as provided in paragraph 1 ...; (bb) There shall be added thereto, or deducted therefrom, the increase or decrease in book value for the full calendar quarters of the current year, if any, which expired prior to the time when the Stockholder made his offer, or terminated his employment, or died.
>
> [5]...(b) If the purchase price is more than $20,000, at the option of Corporation, in lieu of paying the same as provided in (a) above, a down payment of $20,000 shall be made at the closing, and the balance shall be paid in equal annual installments of $20,000 each (except the last, which shall be for the balance due), the first installment to be due one year after closing, and the remainder annually thereafter, with interest at the rate of four percent (4%) per annum, from the closing date, with privilege to the Corporation to prepay the principal at any time.

As discussed above, the prerequisite three-year holding period of paragraph 3, and the four percent per annum interest rate of paragraph 5 were abrogated by the 1970 agreement, which now controls, thus providing for

immediate repurchase by ORG of "all shares" held by Bregman[3] at book value,[4] with prime rate interest on deferred installment payments.[5]

Greene Option

On August 31, 1972 plaintiffs entered into a written contract that granted to defendant and others options for shares of ORG stock.[6]

It provides, in pertinent part:

> 1. Greene does hereby give an option to the persons named in Exhibit A annexed hereto,[7] to be exercised within five (5) years of the date hereof, to purchase from Greene the number of shares set forth opposite the name of each on such Exhibit. The purchase price shall be as follows:
>
> > (a) If the option is exercised within three (3) years of the date hereof, $5.47 per share.

Bregman, by certified letter on November 5, 1973 attempted to exercise his option and purchase the 5,000 shares from

---

3. "If your employment is terminated by NCK, all shares of the capital stock of NCK then owned by you will be repurchased..." June 17, 1970 agreement (Compl. Exh. B), paragraph 8 (emphasis added). Bregman's employment was terminated by NCK as of January 2, 1974. B. Dep. Exh. 4; Compl., ¶6. If Bregman's exercise of his option had been duly honored he would have become the Owner of the 5,000 shares by December 14, 1973. Compl., ¶15.

4. SSA October 25, 1967, paragraph 3, supra, page 5.

5. Idem, paragraph 5, supra, page 5.

6. N. Dep. Exh. 5A-H; B. Dep. Exh. 9

7. The Exhibit A referred to is N. Dep. Exh. 5G, which grants Bregman an option for 5,000 shares.

Greene who, by letters dated November 29, 1973 and December 7, 1973,[8] refused to transfer the shares. ORG has, if only by virtue of its institution of the within action, anticipatorily breached its contract to repurchase the shares at December 31, 1973 book value pursuant to the SSA of 1967 as modified by the 1970 agreement.

As with the prior contracts, the Greene option is clear, unequivocal, complete and unambiguous upon its face and evidences a completed act; the option was granted. Plaintiffs acted in concert to deprive defendant of his contract rights and of the profits justly due him thereunder. (N. Dep. pages 39-41).

Because each of these written contracts is clear, unequivocal and unambiguous on its face there can be no triable factual issue raised concerning their effect. The first two have been appended to the complaint and, thus admitted by plaintiffs, control over any inconsistent allegations in the complaint.[9] The third was admitted by plaintiffs' counsel during the Norman deposition;[10] and is similarly controlling. Their meaning and effect is a matter

---

8. True photocopies of these letters are appended hereto, and will not be denied by plaintiffs.

9. For the purpose of this motion for summary judgment, the exhibit itself must control, despite any contrary or inconsistent allegations in the complaint. Consolidated Jewelers, Inc. v. Standard Financial Corp., 325 F.2d 31 (6th Cir. 1963). Moreover, such assertions are barred by the parol evidence rule discussed, infra.

10. N. Dep. page 52.

for judicial determination. National Utilities Service, Inc. v. Whirlpool Corp., 325 F.2d 779 (2d Cir. 1963); West, Weir & Bartel, Inc. v. Mary Carter Paint Co., 25 N.Y.2d 535, 307 N.Y.S.2d 449 (1969); see also, United States v. J. B. Williams Company, Inc., 354 F. Supp. 521 (S.D.N.Y. 1973). Plaintiffs cannot raise any factual issue regarding them, thus cannot defeat summary judgment for defendant.

Unrelated Collateral Issues

Plaintiffs raise a number of extraneous issues which can only obfuscate and confuse the issues presented by their complaint. Whatever agreements or arrangements others may have had with plaintiffs regarding their stock sales or purchases (Compl. paragraphs 10, 12, 13 and 14) cannot bind Bregman, nor are certain subordination agreements (Compl. paragraph 11) material here. As will be shown below, any such matters that preceded the three written contracts that give rise to Bregman's rights are legally null under the parol evidence rule; and nothing that followed them could derogate from such rights without affirmative agreement thereto by Bregman himself, supported by consideration effective to bind the bargain.

The complaint not only refrains from alleging that Bregman entered into any such agreement; it explicitly concedes that he did not do so (paragraph 14). It stops

chort with, at most, a claim that he knew ORG had in mind to require him to do so if he sought to exercise his rights to purchase shares from Greene and to resell them to ORG under the terms of his 1970 contract with it.

Such mere knowledge, even if he had possessed it, would not be tantamount to the binding agreement that would be necessary to dissolve his previously existing rights. Plaintiffs' unilateral desires, no matter how well known to Bregman, cannot be imposed upon him without his legally binding consent.

Thus, in paragraphs 12 through 14 of their complaint plaintiffs refer to two proposed agreements which were to modify the SSA with respect to purchases of shares from either Kaplan or Greene. The former was proposed by plaintiffs' counsel on August 24, 1973 (N. Dep. pages 62-67 and Exh. 8 A-D) and is referred to here as the "proposed Kaplan modification." The latter, proposed on September 8, 1972 (B. Dep. pages 48-49, and Exhibits 10 and 11), is referred to as the "proposed Greene modification."[11]

The merely tentative nature of these documents can be seen in the discussion by plaintiffs' counsel.

---

11. Mr. Norman, in his deposition, testified that he never spoke to Mr. Bregman about these proposed agreements directly; that is, to defendant alone. All discussions concerning them were in a group, some of whom were to purchase other shares. Mr. Bregman was not required to pay attention to any discussion which did not directly concern him, and plaintiff cannot show that he had knowledge of these agreements. (N. Dep. page 32)

Mr. Winkler, at pages 65 and 78 of the Norman deposition. Both were forwarded to ORG simply as proposals and for comment (B. Dep. Exh. 10; N. Dep. pages 64-65). No final document was ever produced by plaintiffs. The word "proposed" was not used lightly (idem) and the second agreement did not even come into being. Nevertheless, it could not, in any event, derogate from Bregman's rights for he was not party to it.

Plaintiffs concede that he did not sign the "proposed Kaplan modification" as he did not purchase any shares from Kaplan (Compl. ¶14). However, even had he done so it would not actually have affected his release by the 1970 contract from the three-year retention requirements. As characterized by plaintiffs' counsel, the purpose and intent of the proposed Kaplan modification was to replace the SSA's criterional date of subscription and subscription price with date of purchase and purchase price so as to bring the shares purchased from Kaplan or Greene within the same principles of three-year retention as the SSA's imposed for other shares.

> ...and I know for a fact [I] pointed out in not one but at several meetings that these options would be exercisable along the usual lines of the company which is the retention of the stock for three years without question (N. Dep. page 31, emphasis added).

...[Dregman] was repeatedly told that all stock that anyone purchased was subject to the three-year restriction. There were no exceptions.

Q That was because of the standard stockholders' agreement?

A Yes; coming in, going out, sideways, upside down, anyway you like it. That was the agreement between the stockholders. (Idem, pages 36-37.)

And when we outlined the final details of the Greene deal and the remaining problems, as I said to you a moment ago, the remaining money to purchase the Kaplan stock, there is not question whatsoever that it was clearly spelled out that these options would be like all other options in this company had been before. (Idem, page 39, emphasis added.)

MR. NEIL: Maybe we can clear this up, Mr. Norman has indicated that these various individuals signed numerous agreements with the Organization.

THE WITNESS: That is right, they did.

Q Now, I am trying to focus on the particular - -.

A Excuse me. I didn't say that. I said all of our executives have signed this style of agreement, and each and every time they purchased stock, without exception. That is what I said.

Q This is a reference to an agreement that was signed at the time of the purchase of the Kaplan shares?

A We are talking about the same agreement. You continue to want to make this a special one. It is not a special one. It is the same agreement. These men and others like them have continuously signed, and the job of getting them signed was the job of the corporate counsel, Mr. Randall, and he did it in all cases. (Idem, pages 58-59.)

Q Are you telling me, then that you agree with Mr. Winkler's statement in Exhibit 8-A, which reads, "The effect of this agreement is to relate these new shares held pursuant to the standard form of stockholder agreement?

A Yes. (Idem, page 66.)

A When anybody purchases stock in our company, share by share, group by group, they always sign these agreements as they get the additional shares. That is simply the way it is done. So the answer is, yes, he [Bregman] was told.

Q And he was told that that was in accord with the standard practice?

A He not only was told it, but, of course, being an officer of the company and having employees with whom he did it all the time, of course he knew about it. (Idem, page 77a, emphasis added.)

However, Bregman's special agreement in the 1970 employment contract relieved him from the three-year retention period that constituted the "usual lines" and "standard practice" that bound the other executives. (Idem, page 70.)

If the purchase and resale of Kaplan or Greene shares of stock was to be brought into conformance for each shareholder with the usual lines and standard practices governing his holdings of ORG stock, that, for Bregman, could mean only that he, in pursuance of the usual lines and standard practice for him, was to be free of any retention period as a prerequisite to reselling such shares to ORG at book value.

Even if Bregman had actually signed an agreement (for adequate consideration) amending the 1967 SSA so as to change "subscription" date and price to "purchase" date and price with respect to Greene shares, the 1970 agreement would still have left him as free of the three-year retention prerequisite with respect to purchase dates as it had made him with regard to subscription dates.[12]

The proposed Greene modification was only a tentative draft on September 8, 1972,[13] (after Bregman's option rights had matured). Plaintiffs make no pretense at showing that he ever signed any modification of his earlier contract that had freed him from all retention period requirements as to all shares he might own or even that he knew of any concrete document meeting the description in paragraph 13 of the complaint. (N. Dep. pages 70-77.) In any event, there is no difference between the proposed Kaplan and Greene modifications in their basic intent to make the usual and standard retention period provisions of the SSA's applicable to the Kaplan and Greene shares. (N. Dep. page 77.) Thus, as discussed above, neither proposed modification could impact upon Bregman.

---

12. "...without regard to the length of time you have held such shares." (Supra, page 3.)

13. N. Dep. Exh. 10.

The Law

This case is governed by a simple and basic legal principle, the parol evidence rule.

Bregman's rights under the clear and complete written contracts of June 17, 1970, October 25, 1967 and of August 31, 1972 may not be altered by any declaration made by the plaintiffs unilaterally and outside those writings, for they embody the entire contract.

The parol evidence rule forecloses plaintiffs from introducing any precedent or concurrent evidence, including the proposed modifications, which would alter, vary or modify the terms of any or all the agreements described above. Aratari v. Chrysler Corporation, 35 A.D.2d 1077, 316 N.Y.S.2d 680 (4th Dept. 1970); Thomas v. Scutt, 127 N.Y. 133, 27 N.E. 961 (1891); Sabo v. Delman, 3 N.Y.2d 155, 164 N.Y.S.2d 714 (1957); Jamestown Business College v. Allen, 172 N.Y. 291, 64 N.E. 952 (1920); see also, The NCK Organization Ltd. v. Burr Lucey Co., Inc., 39 A.D.2d 873, 333 N.Y.S.2d 437 (1st Dept. 1972).

The rule controls in favor of anyone whose rights flow from a written contract; thus, it is equally applicable in fashioning Bregman's third-party beneficiary rights under the August 31, 1972 contract.

"Although it is sometimes broadly observed that the parol evidence rule has no application to any except parties to the instrument...it is clear that in the case of a fully integrated agreement, where parol evidence is offered to vary its terms, the rule operates to protect all whose rights depend upon the instrument even though they were not party to it." Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 239 N.Y.S.2d 865 (1963).

See also, Vinciguerra v. State, 38 A.D.2d 607, 326 N.Y.S.2d 293 (3d Dept. 1971); County Trust Co. of N.Y. v. Mann, 242 App. Div. 206, 273 N.Y.S. 597 (1st Dept. 1934); Spingarn v. Rosenfeld, 4 Misc. 523, 24 N.Y.S. 733 (Ct. Com. Pl. 1893).

The rule is operative on a motion for summary judgment in state courts, West End Fed. Sav. & Loan Assn. of Albany v. DiBoise, 19 App. Div. 436, 55 N.Y.S.2d 854 (1st Dept. 1945), as well as in the federal courts. Ford v. Louria Steel & Trading Corp., 192 F.2d 880 (8th Cir. 1957). In Louria Steel the court, granting summary judgment dismissing defendant's counterclaim based on an alleged oral agreement, said:

"The controlling question in this case is whether evidence to establish the defendant's alleged oral...agreement would be admissible upon a trial. Nothing is more futile than calling a jury to determine a fact the existence of which is not susceptible of proof." 192 F.2d at 882. See also, Ford v. Hahn, supra.

As stated by Professor Moore:

> "[In] actions involving written contracts the parol evidence rule may operate so that there is no factual issue in dispute, so that summary judgment may be rendered for the party entitled to judgment under applicable principles of contract law." Moore's Federal Practice, ¶56.17 [11] at p. 2512.

Thus, no legal consequences can be assigned herein to the proposed modifications upon which plaintiffs' contentions wholly rest, short of a showing that after the maturation of Bregman's rights under the 1970/1967 and 1972 contractual trilogy:[14]

1. he explicitly agreed

2. for adequate consideration

to relinquish as to Greene shares his existing 1970 contract rights as to "all shares", i.e., to be free of the retention period requirement that might have been the "usual rule" and "standard practice" for others, but not for him. (N. Dep. page 70.) As shown at pages 9-12 above, there is not even an allegation, much less the demonstration of a triable issue, that such were the facts.

Summary

In short, whatever preceded the undisputed written contracts upon which Bregman's claims rest cannot affect them because of the parol evidence rule. Whatever

---

14. All that is prior thereto falls under the parol evidence rule.

postdates them cannot do so because Bregman did not agree thereto; in no event for a binding consideration.

Since, under those contracts, Bregman was clearly and unambiguously

1. entitled to purchase 5,000 shares of ORC stock from plaintiff Greene at $5.47 each; and

2. entitled to have plaintiff ORC repurchase said shares at their December 31, 1973 book value; and

3. entitled to be paid prime rate interest by ORC on deferred installments of said purchase price,

there is no material and substantial issue of fact to be tried herein.

Conclusion

Summary judgment should be granted in defendant's favor as demanded by this motion.

Dated: New York, New York
October , 1974

Respectfully submitted,

WEIL, LEE & BERGIN

By _____
Bruce R. Kafner
Attorneys for Defendant
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

Mr. Walter W. Bregman
Norman, Craig & Kummel, Inc.
919 Third Avenue
New York, N.Y. 10022

November 29, 1973

Dear Wally:

In reply to your letter of November 5, 1973, a condition to the exercise of the option to which you refer is execution by the person exercising the option of an amendment to the Corporation's printed form of Stockholders Agreement applicable to shares so purchased.

I am sure that you are familiar with that amendment--but in any event a copy has been sent to Mr. Weil.

Very truly yours,

Bill

William E. Greene, Jr.

December 7, 1973

Gilbert H. Weil, Esq.
Weil, Lee & Bergin
60 East 42nd Street
New York, N. Y. 10017

Dear Mr. Weil:

Your letter of December 3, 1973 asks whether my letter to Wally Bregman of November 29, 1973 is to be taken as a firm refusal to transfer 5,000 shares of Norman, Craig & Kummel Organization, Ltd. unless he executes the amendment referred to therein. It is exactly that. It is inconceivable to me that Wally Bregman, who is the only one of the major partners who did not invest in Kaplan stock, should still have greater rights than those who did so invest.

I also question whether Wally can exercise his option after notice of termination of his employment has been given to him; but that question will become irrelevant if Wally signs the paper that I have described which clearly states that the purchase price to be paid by Norman, Craig & Kummel Organization, Ltd. for his shares, if the purchase takes place less than 36 months after he has acquired the shares, will be the price paid by him for the shares, book value being considerably higher than that amount.

Yours very truly,

William E. Greene, Jr.

Appendix II

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

Affidavit of Service by Mail

Anne M. Zaccagnino being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 3900 Greystone Avenue, Bronx, New York 10463.

On October 4, 1974 deponent served the within Notice of Motion for Summary Judgment upon BISCO, WINKLER & HIGGISTON; attorneys for Plaintiff in this action, at 645 Madison Avenue, New York, N.Y. 10022 the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - ~~a post office~~ - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Questions to ask:

1) What specific info best to resign from what point of view

4) State of Emer options - when exercise, must they be held specified time - within that time to take one

Q 4. Status of Quem options? When exercised? Must they be held a specified time?

A. With regard to your option to purchase 6,000 shares of NCK Class B Stock from Mr. Quem, the option is exercisable at any time. Although the option agreement does not specify the procedure, you would presumably give notice to Quem of your exercise of the option and would fix a date (say, 15-20 days) on which he would deliver the shares and you would pay the purchase-price.

Until 8/31/75, the purchase (option) price is $5.47 per share.

The agreement between Quem and NCK Org. says nothing about a minimum "holding period" for ~~paid~~ these option shares before the purchaser is entitled to be paid their full market value. Therefore, the question seems to be whether or not the three-year holding period specified in your Stockholders Agreement (dated 9/6/67)

Attachment B
Page 2

is applicable. If it is not, there exists at least the possibility that, after having exercised your option to buy the Grace shares and then terminating your employment, you could require NCK to purchase those shares at the then applicable book value.

If this question were to be litigated - which would be quite likely if you were to force the issue - in my judgment the decision could go in any of at least three ways. Obviously, the most favorable result would be that the three year holding period is not applicable but NCK must nevertheless repurchase the shares in accordance with ¶ 3(b) of the Stockholders Agreement, i.e. at their current book value. Another possible result is that the Stockholders Agreement does not apply to these shares at all, either with regard to holding period or repurchase. This would place you in the position of continuing to hold 5,000 existing shares, without any obligation to sell them to NCK at any time and with no restriction on your right to sell them to anyone else. The worst result from your

standpoint would be that the three year holding period requirement applies and that the shares are subject to repurchase by NCK at the price you paid for them (such price being deemed for this purpose to be the "subscription price").

I could make a reasonably persuasive argument for any one of these results. To say the very least, the outcome of any such lawsuit would be hard to predict.

Ultimately, this all comes down to a question of whether or not you would be prepared to invest $27,500 in 5000 of Gene's shares in order to have the opportunity to put some "heat" on NCK. In my opinion, there are enough risks involved to make this a very dubious undertaking.

Service of a copy of the within Defendant's Memorandum In Opposition to Motion to Disqualify is hereby admitted.

Dated: New York, New York
January 24, 1975

Bisco, Winkler & Higgiston
Attorneys for Plaintiffs
645 Madison Avenue
New York, New York 10022

Affidavit of Gilbert H. Weil

dated May 14, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant.

74 Civ 776 (C.B.M.)

AFFIDAVIT

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GILBERT H. WEIL, being duly sworn, deposes as follows:

1. I am a partner in the firm of Weil, Lee & Bergin, attorneys for defendant herein, and, as chief litigation counsel, I am personally familiar with the matters to be set forth below.

2. This affidavit is submitted in opposition to plaintiffs' motion to disqualify my firm from continuing its representation of Mr. Bregman. At the same time, the facts it will set forth will, coinci-

dentally, establish that Donald W. Randall, Esq., as well, could not be found guilty of the appearance of impropriety even if he were a litigation counsel in this case, which he is not and never has been, as will be shown by the following firmly documented facts.

A.) The issues will be governed by undisputed documents. Most of them have been admitted by the complaint itself; but even more conclusively, plaintiffs have never disputed this fact despite our constant reiteration of it in our earlier papers, and the Magistrate's reliance upon it for his recommendation to this Court.

B.) Mr. Bregman, by virtue of his positions as President, Chief Operating Officer and a Director

of NCK, Inc., and Senior Vice-President and a Director of NCK Organization Ltd., was directly privy to all,and more, than Mr. Randall could have disclosed to him.

Those factors were, I was convinced, sufficient to put down plaintiffs' motion. They are fully discussed in our previous papers and need no further orchestration here.

3. Now, however, in view of the honorable magistrate's apparent ambivalence, as to which we have filed objection, and the Court's desire for a fuller hearing, I present the following facts, which demonstrate

A.) that Mr. Randall was in no way at any time"co-counsel" with my firm in this case; but

B.) that, at least up until January 8, 1974, even if he had been - even, indeed, had he been the solely named attorney of record for Mr. Bregman, there would not have been an "appearance" of impropriety, due to the fact that, until that date, it was anticipated that Mr. Bregman's action to recover for breach of the Greene option agreement would be brought against Mr. Greene alone, and that there would be no adversarial litigative conflict with NCK; and

C.) that the body of law, referred to above, known to plaintiffs directly or through their attorneys, and the facts which will be indicated in the course of the following chronological recital, make their

persistence in their motion so outrageous as to require them to pay defendant's reasonable attorneys' fees in opposing it, as defendant has requested in its earlier papers.

I can state, preliminarily, that defendant has given me permission to exhibit to the Court, if it so desires, in camera and ex parte, any documents referred to below that are privileged.

Pertinent Events In Chronological Order

4. I was first contacted by Mr. Bregman regarding the events that have led to the within litigation on or about October 9, 1973 by telephone. He said he had been given notice of discharge by NCK; that there were a number of matters connected with it that might have to end up in the courts; that his lawyer at the time was not a trial attorney; and he asked whether I would be willing to represent him and step into the picture.

I told him that I would be glad to, and he said he would have his lawyer, a Mr. Randall, send me the papers that had to do with the situation. He reported, also, that a letter had been sent the day or so before to Mr. Norman B. Norman, of NCK, setting forth a list of items that Mr. Bregman claimed he was entitled to from NCK; that no answer had yet been received; but that it, together with the other papers in the file would give me the picture. The letter he referred to has since been marked as Px 5 in the discovery proceedings herein. I asked Mr. Bregman to have Mr. Randall send me the file in Montreal, as I was going there to attend a meeting for about a week.

5. On or about October 15, 1973 I received the above materials. They consisted of eight documents, seven of which have been marked in the course of the discovery proceedings herein, at the instance of the plaintiffs themselves, as Px 1, 2, 3, 4, 5, 8 and 21. The eighth was a memorandum dated July 23, 1973 from John Citron, NCK's Treasurer, which was addressed directly to Mr. Bregman himself. Each of these documents

affected Mr. Bregman directly and, obviously, had come into his cognizance as the president or a director or shareholder in the corporate plaintiff's organization. There was also in the package a covering hand-written memorandum by Mr. Randall explaining each of the papers in the file.

6. It seemed quite clearly to me, after having studied the above materials, that Mr. Bregman's claims as to his rights in Px 5 turned upon the application of the documents that had been sent to me. This evaluation is confirmed by a statement of plaintiffs' own counsel, Leonard G. Bisco, Esq., in his letter of October 25, 1973 to Mr. Bregman, responding to Px 5: "... almost every paragraph contains statements which are not in accordance with the facts as I understand them after a thorough examination of your past documents with the Agency." (Underscoring added.)

7. On October 16, 1973 I telephoned Mr. Randall from Montreal; recited to him my understanding and interpretation of the papers in the file, and my

estimation that Mr. Bregman's rights stood or fell on them; and I asked him whether he thought that the fact that he had been representing Mr. Bregman although he had previously been general counsel to NCK (a fact I first learned from his hand-written memorandum referred to in paragraph 5 above) might not be exploited by NCK at some time in the future if a hard controversy developed. Mr. Randall confirmed my understandings of the documents, and that he, too, believed that everything depended upon them; and he said he did not think NCK could make much out of his prior representation, since Mr. Bregman knew everything, and probably more, than Mr. Randall about the factual background surrounding his position vis-à-vis NCK, and everything turned on the written contracts and, insofar as figures and accounting might be concerned, upon the books and records of the corporation that would be subject to to subpena or discovery in any event if the necessity should arise. Actually, of course, none of that is

involved in this case. The explanation satisfied me. As long as Mr. Randall, who struck me during the course of the telephone conversation as a cautious, conservative and thoroughly competent lawyer, was not aware of anything in the past that had involved him in any breach of privilege or confidentiality, I saw no problem; for I knew that I would be taking over in the future from him.

8. On October 24, 1973, after I had returned from Montreal, I met with Messrs. Bregman and Randall to discuss Mr. Bregman's letter of October 8, 1973 to Mr. Norman, and the related documents that Mr. Randall had sent me. The Court will note from paragraph 4 above that the Greene option contract of August 31, 1972 was not a part of that file. Mr. Bregman had not yet made up his mind whether he wanted to exercise that option. Hence, it was not one of the matters that came under any serious discussion at that meeting. Merely,

to the best of my present recollection, it was then that Mr. Bregman (not Mr. Randall) gave me a copy of the NCK-Greene contract; and, without going into it at any length or depth, it was generally felt that since Mr. Bregman's employment contract of June 17, 1970, paragraph 8, covered all shares of stock, those obtained by means of the Greene option would not constitute an exception.

9. On November 2, 1973, after Mr. Bregman had received Mr. Bisco's letter of October 25, 1973, the net effect of which is summed up in and obvious from the excerpt quoted in paragraph 6 above, I met with Mr. Bregman and Mr. Randall, and it was decided that I would take over at that point, and arrange to meet with Mr. Bisco to commence negotiations on Mr. Bregman's behalf.

10. Accordingly, I sent a letter, dated November 2, 1973 to Mr. Bisco suggesting such a meeting. (No copy of the letter went to Mr. Randall, although one was sent to Mr. Bregman.)

11. It was also at the November 2, 1973 meeting that Mr. Bregman decided to exercise the Greene stock option, after I had told him that, having studied the matter since our last meeting, I was convinced that he was entitled to redeem Greene shares immediately at their book value under his June 17, 1970 contract. I drafted for him, either at the meeting itself or immediately afterwards, his letter to Mr. Greene invoking his option rights, which he then sent to Mr. Greene under date of November 5, 1973.

12. My next contact with Mr. Randall was not until December 6, 1973, when I telephoned him to report that I would be having a conference the next day with Mr. Bisco, and that I wanted to check his memory (and to test the accuracy of Mr. Bregman's) that despite an entry (Px 41B) Mr. Randall had made in the minutes

of an NCK Board meeting of December 15, 1972,Mr. Bregman had not signed any documents to waive his right, under the June 17, 1970 employment contract, to redeem Greene option shares without a three-year waiting period. Mr. Randall said that he didn't know of any such waiver and did not believe that the attachments to the meeting minutes, referred to in his said entry, had actually included any such document. Meanwhile, however, I had engaged in a number of activities on Mr. Bregman's behalf. Mr. Randall played no part in any of them, was not advised or consulted with respect to them; and letters related to them were not copied to him. These included conferences and correspondence with Mr. Bisco and Mr. Winkler, conferences with Mr. Bregman; and, importantly, transmission of my letter of November 28, 1973 to Mr. Greene restating and confirming Mr. Bregman's exercise of his option with respect to Mr. Greene's

shares of stock involved in this case. It is highly significant that my office should have been handling such matters quite independently of Mr. Randall, for by this time it had become clear that all centers of controversy between Mr. Bregman and NCK either had been or would almost surely be resolved with the exception of Mr. Bregman's right to redeem Greene option shares immediately at book value. If Mr. Randall had been thought of, by either Mr. Bregman or myself, in the light of serving as co-counsel in any litigation that might evolve as to that issue, such as the within case, certainly I would have consulted with him in advance concerning such important steps as my letter of December 3, 1973 to Mr. Bisco stating Mr. Bregman's position on each matter in controversy, and Mr. Bregman's letter of November 5, 1973 to Mr. Greene referred to in paragraph 11 above.

13. Similarly, after December 6, 1973, and until January 24, 1974, a period during which many highly

important events took place and decisions were made, no contact was had at all between my office and Mr. Randall. During that time, for example:

A.) Mr. Bregman and I met with Messrs. Bisco and Winkler (on December 14, 1973) to discuss the Greene option stock redemption dispute. A few days before that Mr. Bregman and I had met to prepare for that conference.

B.) On December 27, 1973, after having received authorization from Mr. Bregman to institute whatever legal action I deemed advisable with respect to the Greene stock option, I, together with two associates in my office who had been working with

me on the matter, came to the conclusion that action should be brought by Mr. Bregman against Mr. Greene alone, and not against NCK. I telephone Mr. Bregman, advised him of that decision, and he agreed to it.

C.) My office, still not consulting or communicating with Mr. Randall, went forward with drafting the complaint against Mr. Greene and with certain legal research related to it, all of which resulted in our decision to lodge the complaint in the within Court.

D.) Under date of January 8, 1974, Mr. Bisco mailed to my office a copy of a summons and complaint against Mr. Bregman in the New York State

Supreme Court, New York County, asking that we admit service on behalf of Mr. Bregman, which we responded we had no authorization to accede to. The complaint was, in every essential respect, identical to the one in the within action.

E.) On January 17, 1974 we filed Mr. Bregman's suit against Mr. Greene in this Court (74 Civ. 301 CBM).

F.) On January 24, 1974 we obtained authority, through a telephone conference with Mr. Bregman, to accept service of NCK's Supreme Court summons and complaint. On the same date I also had telephone conferences with Mr. Bregman and

Mr. Randall to give them a run-down on the two lawsuits, and to report that I had decided to remove NCK's Supreme Court action to the within Court, and expected that, one way or the other, it would end up being consolidated with our action already pending there.

14. The high importance of the dates December 27, 1973 and January 8, 1974 to the within motion must be noted. At no time prior to our receipt of the NCK complaint against Mr. Bregman did there exist an adversarial litigative relationship between him and NCK. To the contrary, our decision on December 27, 1973 to bring action only against Mr. Greene and not against NCK would have appeared to rule out such a status. If

events had gone no further than Mr. Bregman suing Mr. Greene in 74 Civ. 301 CBM, Mr. Randall could have served, although he did not, as co-counsel, or even as sole counsel in that case. He had never represented Mr. Greene in any way; there would have been neither actual nor appearance of impropriety. All that preceded that date, therefore, is not substantively germane to the plaintiffs' within motion, for no litigation pitting Mr. Bregman and NCK as parties adversary to each other was in existence or was contemplated on Mr. Bregman's behalf. If either Mr. Randall or my own firm were to be disqualified from further representing Mr. Bregman it would have to be on the basis of an"appearance of impropriety" arising subsequent to January 8, 1974 (there has been no claim of actual impropriety at any time).

15. With the exception of the January 24, 1974 telephone call to Mr. Randall, referred to above, reporting the various filings, no further contact was had with him until June 6, 1974, at which time my associate, Mr. Hafner, called him to check on the accuracy of a conformed copy of NCK's standard shareholders' agreement with Mr. Bregman, which Mr. Randall had sent to me initially in the materials referred to in paragraph 5 above. Yet, between January 24th and June 6th, 1974 such material events had taken place as removal of NCK's Supreme Court action to the within Court (74 Civ. 776 CBM), service upon Mr. Greene of Mr. Bregman's summons and complaint against him (74 Civ. 301 CBM), consolidation of the two federal actions into the within action, filing by defendant of a motion to strike the complaint, and the taking of Mr. Bregman's deposition by the plaintiffs. It was in connection with the latter, and with the knowledge of plaintiffs' attorneys, that Mr. Hafner called Mr. Randall, to obtain clarification

regarding the conformed copy of the shareholders' agreement, on June 6, 1974.

16. Following June 6, 1974 there was no further contact or communication between Mr. Randall and my office until plaintiffs had noticed the taking of his deposition. Then, on October 1, 1974, Mr. Hafner and I met with Mr. Randall to discuss that forthcoming deposition. All subsequent meetings, contacts or other communication between Mr. Randall and my office dealt solely with that deposition or with the pending motion of disqualification.

17. If plaintiffs, through their attorneys or otherwise directly, knew nothing else, they were certainly aware of a) the existing law that, absent actual impropriety, new counsel cannot be disqualified on the artifical concept of "appearance of impropriety" for association with an earlier counsel for an adverse party, and b) that insofar as Mr. Bregman, Mr. Randall, and my

own office were concerned, our picture did not include an adversarially litigative status against NCK (as evidenced by Mr. Bregman's original complaint against Mr. Greene as a sole defendant), and that, consequently, other than by NCK's own act, which first surfaced on January 8, 1974, there would have been no basis whatsoever upon which to predicate disqualification. What NCK did on January 8, 1974 could not retroactively impose "an appearance of impropriety" upon conduct that prior thereto bore no such coloration. There was something else plaintiffs knew, as well, to put them on notice that their persistence in pressing the within motion is unjustifiable. On September 25, 1974 Peter Messer, Esq., an associate in the offices of plaintiffs' attorneys, telephoned Mr. Hafner and, in the course of advising him of the plaintiffs' intention to depose Mr. Randall, asked Mr. Hafner to arrange a date for Mr. Randall's appearance. Mr. Hafner responded that Mr. Messer had better contact Mr. Randall himself, as we

had no control over him. And, of course, plaintiffs have well known from an early date of the frequently stressed facts that a) this case concerns written documents as to which there is no dispute, b) that there is nothing Mr. Randall has ever known pertinent to this case which is not as well known, if not better, to Mr. Bregman without reliance upon any disclosure by Mr. Randall, and c) that I, too, have been cognizant of those situations from the time I first entered the case. Charged with all that knowledge, plaintiffs' prosecution of this motion is inexcusable and irresponsible, motivated in all likelihood by Mr. Norman's personal resentment against the two former employees he discharged, Messrs. Randall and Bregman, and his desire to harass them for Mr. Bregman's having dared to go forward with his claim under the Greene stock option. (Note the flavor of his references to Mr. Bregman at pages 31 and 84-88 of his deposition, and the testimony of Mr. Randall regarding

the antagonistic personal relations between Mr. Norman and himself at DWR pages 109/3 - 111/2 and 113/3 - 115/4.)

18. It is respectfully submitted, therefore, that defendant should not be compelled to bear the costs of the defense against this unwarranted motion in order to protect his important right to have my firm represent him herein as the lawyers of his choice. Plaintiffs should be taxed with the cost thereof, including defendant's reasonable attorneys' fees.

Gilbert H. Weil

Sworn to before me
this ~~9th~~ 14th day of May, 1975. /s/ G.H.W. (5/14/75)

BRUCE R. HAFNER
Notary Public, State of New York
No. 41-4521059
Qualified in Queens County
Commission Expires March 30, 1976

Reply to Counterclaim

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD, and WILLIAM E. GREENE, JR., Plaintiffs, -against- WALTER W. BREGMAN, Defendant	REPLY TO COUNTERCLAIM 74 CIV 776 (CBM)

Plaintiffs, by their attorneys, Bisco, Winkler & Higgiston, replying to the counterclaim set forth in paragraphs 11 through 13 inclusive of defendant's answer, allege as follows:

FIRST DEFENSE

1. The counterclaim fails to state a claim against plaintiffs upon which relief can be granted.

SECOND DEFENSE

2. Plaintiffs deny each and every allegation contained in the counterclaim.

WHEREFORE, plaintiffs demand that defendant's counterclaim be dismissed and that they be awarded judgment as demanded in the complaint.

Dated: New York, N. Y.
September 6, 1974

BISCO, WINKLER & HIGGISTON
By _____
Frederick E. Winkler
A Member of the Firm
Attorneys for Plaintiffs
Office and P.O. Address:
645 Madison Avenue
New York, N. Y. 10022
Telephone: (212) 832-2600

Sir:

PLEASE TAKE NOTICE that the within is a true copy of a.....

this day duly filed and entered in the office of the Clerk of the.....

.....

Dated, N. Y., ...19....

Yours, &c.

BISCO, WINKLER & HIGGISTON

Attorneys for.....

(Office and Post Office Address)

645 Madison Avenue

Borough of Manhattan, New York, N. Y. 10022

To ..... Esq.

Attorney for.....

Sir:

PLEASE TAKE NOTICE that an order of which the within is a true copy, will be presented for settlement and entry herein to Mr. Justice.....

.....

.....

.....in the Borough

.....in the City of New York,

on the .....day of.....19

at.....o'clock, in the afternoon.

Dated, N. Y., ...19....

Yours, &c.

BISCO, WINKLER & HIGGISTON

Attorneys for.....

(Office and Post Office Address)

645 Madison Avenue

Borough of Manhattan, New York, N. Y. 10022

To ..... Esq.

Attorney for.....

File No. 74 CIV 776 (CBM) 19XX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTC, and WILLIAM E. GREENE,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant

REPLY TO COUNTERCLAIM

BISCO, WINKLER & HIGGISTON

Attorneys for Plaintiffs

(Office and Post Office Address)

645 Madison Avenue

Borough of Manhattan, New York, N. Y. 10022

Telephone (212) 832-2600

To ..... Esq.

Attorney for

Service of a copy of the within is hereby admitted.

Dated, N. Y., ...19....

Attorney for

Affidavit of Leonard G. Bisco

dated October 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ 776 (C.B.M.)

THE NCK ORGANIZATION LTD., and WILLIAM E. GREENE, JR.,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant.

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LEONARD G. BISCO, being duly sworn, deposes and says:

1. That he is a member of the firm of Bisco, Winkler & Higgiston, attorneys for plaintiffs, he is in charge of this action and makes this affidavit in support of a motion requiring the witness DONALD W. RANDALL to answer certain questions propounded to him upon the taking of his deposition on October 16, 1974.

2. This is an action for a declaratory judgment. Defendant Bregman was the president of Norman, Craig & Kummel, Inc. (NCK) from June 22, 1971 until January 2, 1974 when his employment terminated. NCK is a wholly owned subsidiary of plaintiff The NCK Organization Ltd. (Organization). The witness Donald W. Randall was formerly house counsel to Organization and NCK having been employed on or about September 1, 1967 until July 15, 1973. The witness Randall was engaged in July and August, 1972 in transactions whereby one of the two major stockholders of Organization, B. David Kaplan, sold all of his holdings of shares of Organization at the price of $5.47 per share. Book value was $11.19 per share as of December 31, 1972. As of December 31, 1973 it was estimated to be approximately $12.75 per share. Co-executives

BEST COPY AVAILABLE

of defendant Bregman by the name of Thomas H. Myers, John P. Beresford, Edward W. Roncarelli and William A. Maas all purchased part of the Kaplan shares. Myers purchased 4,000 shares, Beresford 2,000 shares, Roncarelli 7,313 shares and Maas 4,500 shares. Defendant was given an opportunity to purchase Kaplan shares but refused it. Nevertheless, by arrangements made between the plaintiff Greene and Norman B. Norman, the president of Organization, options were given by plaintiff Greene, who purchased 73,125 shares, to each of the said individuals, including defendant Bregman, to purchase 5,000 shares of Organization from Greene at $5.47 per share.

3. The witness Randall was engaged as house counsel in the preparation and handling of the transactions by the said purchasers and defendant and in the entire transaction whereby Mr. Kaplan sold all of his shares and plaintiff Greene became the major purchaser thereof and gave the said options to defendant and the other named individuals. In fact, Randall signed as vice president of Organization all of the agreements dealing with the purchase of shares and the options which were signed by Messrs. Myers, Beresford, Roncarelli and Maas. Defendant Bregman did not sign such an agreement because he had refused to purchase any Kaplan shares but an agreement had been prepared (Compl't. par. 13) for use in case the option was ever exercised stating that the purchase price payable by Organization if employment was terminated within 36 months from the purchase of said shares was to be the lower of the purchase price or the book value thereof at the December 31st next preceding the date of termination of employment. The complaint alleges (par. 14) that defendant Bregman knew of this agreement but this is denied by defendant Bregman.

4. Bregman's employment was terminated on October 2, 1973 by a notice effective three months from date. On

November 5, 1973 he attempted to exercise the Greene option to buy 5,000 shares of Organization from Greene at the price of $5,47 per share and then to compel Organization to immediately buy these same shares from him at $12.75 per share, the estimated book value of the shares as of December 31, 1973. He claims to be justified in doing this by the terms of a special contract which he had entered into dated June 17, 1970, which had been prepared by the witness Randall, a copy of which is annexed to the complaint as Exhibit B. Plaintiffs claim, on the other hand, that the option given by Greene to Bregman could not be exercised when his employment terminated, that it was intended only for executives who remained in NCK's or Organization's employ and, in any case, that it was subject to the signing of the agreement stating that the purchase price by Organization, if employment was terminated within 36 months from the date of the exercise of the option, would be the lower of the purchase price thereof or the book value thereof as of December 31st next preceding the date of termination. Upon these grounds Greene refused to permit the exercise of the option and Bregman, insisting thereon, brought suit for $45,000 for breach of the option agreement. Plaintiff Organization had brought a declaratory judgment action which by stipulation was consolidated with the action brought by Bregman against Greene and Bregman has filed an answer counter-claiming for damages in the sum of $45,000.

5. The prayer for relief in the complaint is for (1) a declaration of the respective rights and obligations of the parties; (2) decreeing that defendant is not entitled to exercise the Greene option for the purchase of 5,000 shares of stock of Organization after the termination of his employment; and (3) decreeing that, in any case, unless defendant agrees that the stock may be purchased by Organization at the same

price paid by defendant to plaintiff Greene he is not entitled to exercise the Greene option or is bound to resell the shares to Organization at the same purchase price.

6. It became apparent from the deposition of defendant Bregman which plaintiffs took that Randall had occupied a dual position in this matter. First, and at the time of the Kaplan transactions and the granting of the options by Greene, he was house counsel for Organization and NCK and (apparently) was acting only for them. However, he was very friendly with Bregman. They lived nearby each other in Connecticut and they travelled to and from work every day in the same automobile. When Randall's employment was terminated in July, 1973, according to the testimony of Bregman, then Bregman consulted him as his own lawyer for the first time, seeing nothing wrong with this, and received his advice as to his own rights in respect to the Greene option and, indeed, the rights of the other executives involved therein, Messrs. Myers, Beresford, Roncarelli and Maas. Bregman testified fully and freely about the advice given to him by Randall when Randall thereby became his own lawyer in the matter where he had formerly represented Organization. Bregman's testimony on this subject is set forth at pages 28 to 31 of his deposition and page 52 thereof, copies of which are annexed hereto as Exhibit A.

7. Arrangements were then made to take Randall's deposition and to go into this matter as well as other activities of his in connection with the purchases of Kaplan's shares and the giving of the Greene options. The first installment of the deposition was taken on October 16, 1974 at the United States Courthouse. Objections were made to his answering several questions on the ground of privilege and the examination was then adjourned without date for a ruling on this

question and there will be a continuation of same after the ruling is obtained.

8. The whole of Randall's deposition, as corrected, is submitted on this motion but the relevant portions may be described as follows: his position as "co-counsel for Mr. Bregman" with the firm of Weil, Lee & Bergin (p.30); he switched his position to become counsel for Mr. Bregman on the date of the termination of his employment which was July 15, 1973 (30,31); they both studiously waited for that date to take place because they thought it would be improper or unethical to switch representations prior to July 15th (31,32); by the time that date arrived Randall and Bregman considered the former to be "a free man" and that there was "no barrier of my representing you to the extent that it doesn't betray any professional confidences or whatever * * *" (33); he was asked whether he really thought, beginning July 15th, he was free to represent Mr. Bregman personally against the company in the same matters that he had worked on for the company and his answer was:

> "A. I had no qualms about it whatsoever. I might point out I fail to see how this line of questioning is germane to the issues in the pleadings that I have seen." (p.33)

He said there had been discussions with "co-counsel" which took place at their offices perhaps three or four times starting in or about November 9, 1973 (33). He went to their office for the purpose of discussing the action "which had been commenced by NCK and Mr. Greene against Mr. Bregman" (35). He intends to bill Mr. Bregman for fees dating from July 15, 1973 (36). He was called upon for advice by Mr. Weil or Mr. Hafner of the firm of the attorneys of record (co-counsel) and he gave advice but whether he gave it to them or to Mr. Bregman he did not know "because I believe that on one or two occasions in question

they were both in the same room". (36)

9. Then came the question of privilege which lead to the witness's refusal to answer certain questions. Deponent pointed out that privilege had been waived by the client's testimony (36) and referred counsel to the pages of Mr. Bregman's testimony on this subject (37), and also submitted a memorandum of law on the subject of waiver. There was considerable discussion of this because defendant's counsel made the point that the waiver related to a conversation in July whereas the witness said that the subject did not come up until the end of 1973 (38,39). Then the witness was allowed to testify that the conversation did not take place until early in October, 1973 (41, 42). He said that for the first time, after Bregman had been fired, they discussed his rights against Mr. Greene but he refused to say what the discussion was "because I was at that time functioning as Mr. Bregman's counsel". When it was pointed out by question "Mr. Bregman has waived that" he answered "No, he hasn't. Not as to any conversation in October after his employment had been terminated in accordance with his contractual agreement" (42). There was considerable discussion following this between both counsel and the witness. The witness testified that Bregman was mistaken as to the discussion in July, 1973 because the question never came up until some time in October but when asked what the conversation was he said "I decline to answer on the ground it is privileged" (43-45). At page 46 he again declined to answer as to the discussion in October on the ground that it was privileged. Then followed a discussion with Mr. Weil as the attorney of record for Mr. Bregman "co-counsel with you" whether Mr. Bregman would waive the attorney-client privilege which Mr. Weil agreed to ask him (47-49) and Mr. Weil later advised deponent that Mr. Bregman refused any

further waiver of privilege. There was a further discussion of the subject at pages 50, 51, 52 in which the witness said that Mr. Bregman was mistaken in his testimony as to discussions (53) and then further objections were made to answering questions at pages 54 and 55.

10. Deponent respectfully submits to the court that in the special circumstances of this case, that Randall having become co-counsel with the attorneys of record and having obviously assisted them in the preparation of their case, that the question of privilege between attorney and client should not be so narrowly construed as attorneys for defendant would like it to be. Mr. Bregman in his testimony effectually waived privilege and the witness should now be directed to answer the questions to which objection was taken.

11. On Randall's testimony, adduced so far, there would seem to be a clear case of disqualification both of himself and of his co-counsel. I pointed this out to them at the conclusion of his testimony. Later the attorneys asked me to defer any motion for disqualification until Randall's testimony was finished as there were some questions that they would like to ask him, and I agreed.

Sworn to before me this
30th day of October, 1974.

Marie A. Rak

MARIE A. RAK
Notary Public, State of New York
No. 31-8484950
Qualified in New York County
Commission Expires March 30, 1976

Leonard G. Bisco

Q Then you thought that you had an advantage through the options, and that the others had the same advantage?

A Yes, and in fact I said this to them some five or six months later.

Q You did?

A Yes.

Q To whom?

A Myers, Roncarelli.

Q You told them you had the right?

A I said, "I think we all have the right to quit and exercise the Greene options."

Q And you paid no attention to the fact that the standard stockholder agreements provide for a holding of thirty-six months?

A Not in my conversations with them.

Q Did they agree with you?

A They seemed very pleased.

Q Did you base that on any advice that you had received from anyone?

A Yes, I had asked Don Randall about it.

Q When?

A It would have to be after July 1 of 1973, so it was probably in the month of July 1973.

Q What did you ask him?

A I asked him if I could exercise my Greene options after resignation, or just prior to resignation, because I was planning to resign.

Q What did he say?

A He said as far as he could tell, the Greene options were outside the bounds of any agreement that I had.

I didn't ask him as to Roncarelli or Myers, because they were not paying him.

Q Were you?

A Yes.

Q You were paying him fees at this time?

A After he was severed from NCK.

Q Let's find out about Don Randall. Who was Don Randall.

A He was the internal counsel, I guess, at NCK.

Q He was a lawyer?

A Yes, he is a lawyer.

Q He was employed at that time by NCK?

A No, he was not. You mean when he was working with me?

Q Yes.

A No, he was not.

Q He is the man that prepared that June 17, 1970 contract, didn't he?

A Yes, everyone's else's contract in the company.

Q He was house counsel, I think you might say?

A That is right.

Q When did he retire or when was his employment terminated, might be more accurate?

A July 1, 1973.

Q Had you used him as counsel before then?

A No.

Q But you had consulted with him, had you not?

A As president of the company I consulted with him.

Q You did not consult with him before that time about your problems?

A No, never.

Q When he left the company in July '73, you used him as your personal counsel?

A In a couple of matters.

Q And you paid him for that?

A I have not paid him yet because he has not

billed me.

Q But you intend to pay him?

A If he bills me, I will. If he does not, I won't.

Q So Mr. Randall advised you after he left the company on July 1, 1973, that you had a right to, as far as he could see, to acquire the Greene stock on option and tender it to the company for an immediate quick profit, is that right?

A For an immediate profit.

Q When was your employment terminated?

A October 2, 1973.

Q You got a letter from Norman, didn't you?

A I did.

Q October 2, 1973 -- is this a copy of the letter we are referring to?

A Yes.

MR. BISCO: I will offer this as Plaintiffs' Exhibit 4 for identification.

(Document referred to above marked as Plaintiffs' Exhibit 4 for identification.)

Q To come back to August '72 when the option was spoken of, you had a talk with Norman about that. Was that in person or over the telephone?

enclosed therein?

A I have never seen this before.

Q Read it please.

Did he show you the papers that were being filed with Miss Flanagan on the Kaplan-Greene deal?

A No.

Q Did he show you the proposed No. 8 in this letter, proposed amendment to the standard stockholders' agreement relating to the purchase by executives of Kaplan stock, either directly or through the exercise of Greene options?

A No.

Q You knew nothing about that?

A Not a thing.

Q You just thought you had a secret advantage?

A I didn't think it was secret. I thought the other people had the same deal I had.

Q Did you believe Norman believed it?

A I didn't think Norman believed it.

Q The reason that you thought the other people believed it was that Randall told you?

A Yes, he told me in July '73, yes.

EXHIBIT A

Affidavit of Leonard G. Bisco

dated May 16, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD., and WILLIAM E. GREENE, JR.,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant.

74 CIV 776 (CBM)

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LEONARD G. BISCO, being duly sworn, deposes and says:

Objections were filed by both sides to the Magistrate's report in accordance with the requirements therein that objections be filed within ten days. Now Mr. Weil has bethought himself of other things and has attempted to interpose a new affidavit of some 23 pages (May 9 and May 14, 1975) in which supposedly he gives the whole story of Randall's and his firm's participation in the representation of Bregman. Though late, we have no objection to the affidavit being received providing this short reply is also received.

Mr. Weil's affidavit shows the complete comradeship and team work between him and Randall who had switched representation from Organization and NCK to Bregman the moment Randall's employment terminated. However, there is a very significant omission from Mr. Weil's affidavit where he says simply that Bregman was undecided whether to exercise the Greene option until their meeting of November 2, 1973 but he then decided on Mr. Weil's advice that he should exercise the option and he says:

"I drafted for him, either at the meeting itself or immediately afterwards, his letter to Mr. Greene invoking his option rights, which he then sent to Mr. Greene under date of November 5, 1973". (Par.11, p.11)

He forgets to say, however, that both he and Randall drafted the notice which was sent out by Bregman on November 5, 1973. Randall was present at the meeting of November 2, 1973 (Weil affd. par. 9, p.10) and he testified on deposition that he was "quite sure", in fact he knew, that he participated in the drafting of the letter of November 5, 1973 (Randall dep. pp. 176,177).

Randall's testimony, especially at the first session on October 16, 1974, is clear that he became counsel for Mr. Bregman the moment his employment terminated with NCK; he then became "co-counsel for Mr. Bregman" with the "firm of Weil, Lee & Bergin" (Randall dep. p. 30). In fact, when he became such counsel he had "no qualms about it whatsoever" (Randall dep. p. 33) and from that time he participated in meetings dealing with the handling of the action on at least three or four occasions; he knows he gave advice to both Weil and Bregman at the same time (Randall dep. pp.33-36).

The point made in Mr. Weil's affidavit that the combined representation of Randall and his firm was really of Mr. Greene whom they had never represented before also omits a number of important items. Greene had no lawyer of his own in the transaction. The first step towards legal action was the preparation of the declaratory judgment action by Organization alone and Mr. Weil held the complaint until it was agreed, at his insistence, that Greene would be joined as a co-party plaintiff. When this was done, Weil, Lee & Bergin interposed an appearance and answer to the consolidated action in which both Organization and Greene were the plaintiffs. In

his counterclaim the rights and obligations of Organization are directly involved by the allegations in paragraph 11 of the answer that Organization was bound to repurchase its shares under the Greene option at "the book value of said shares as of December 31, 1973". Paragraph 12 of the answer alleges a conspiracy between the plaintiffs involving "Organization's refusal to repurchase any of said shares of stock from defendant other than at $5.47 per share". Damages are claimed in paragraph 13 only because Organization is unwilling to purchase the shares at more than the purchase price of $5.47 per share. The prayer for relief asks for a declaration "that plaintiff Organization is obligated to purchase said 5,000 shares of stock from defendant at the book value thereof as of December 31, 1973" and asking for damages accordingly.

It can only be assumed that what is so "outrageous" and so "inexcusable and irresponsible" (Weil affd. 5, 22) is not plaintiffs' insistence upon the motion to disqualify but rather the conduct of both Mr. Randall and the Weil, Lee & Bergin firm in lightly assuming until after the first installment of Randall's deposition that what they did was perfectly proper and that Randall, despite his constant participation with the Weil, Lee & Bergin firm, need have no qualms about the propriety of his actions.

Leonard G. Bisco

Leonard G. Bisco

Sworn to before me this
16th day of May, 1975

Marie A. Rak

MARIE A. RAK
Notary Public, State of New York
No. 31-8484950
Qualified in New York County
Commission Expires March 30, 1976

quite certain it was before t[illegible]

Sir:

PLEASE TAKE NOTICE that the within is a true copy of a ..... this day duly filed and entered in the office of the Clerk of the .....

.....

Dated, N. Y., ... 19....

Yours, &c.

BISCO, WINKLER & HIGGISTON

Attorneys for .....

(Office and Post Office Address)

645 Madison Avenue

Borough of Manhattan, New York, N. Y. 10022

To ..... Esq.

Attorney for .....

Sir:

PLEASE TAKE NOTICE that an order of which the within is a true copy, will be presented for settlement and entry herein to Mr. Justice .....

.....

.....

.....in the Borough

.....in the City of New York,

on the ..... day of 19

.....o'clock, in the forenoon.

Dated, N. Y., ... 19....

Yours, &c.

BISCO, WINKLER & HIGGISTON

Attorneys for .....

(Office and Post Office Address)

645 Madison Avenue

Borough of Manhattan, New York, N. Y. 10022

To ..... Esq.

Attorney for .....

File No. 71 CIV. 776 (CBM) 19__

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD., and
WILLIAM E. GREENE, JR.,

Plaintiffs,

-against-

WALTER W. BREGMAN,

Defendant

AFFIDAVIT

BISCO, WINKLER & HIGGISTON

Attorneys for Plaintiffs

(Office and Post Office Address)

645 Madison Avenue

Borough of Manhattan, New York, N. Y. 10022

Telephone (212) 832-2600

To ..... Esq.

Attorney for

Service of a copy of the within

is hereby admitted.

Dated, N. Y., ... 19....

Attorney for

190A

Report of Magistrate Raby

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NCK ORGANIZATION LTD., and WILLIAM E. GREENE, JR.,

Plaintiffs,

-v-

WALTER W. BREGMAN,

Defendant.

REPORT OF UNITED STATES MAGISTRATE

74 Civ. 776 (CBM)

TO THE HONORABLE CONSTANCE BAKER MOTLEY, U.S.D.J.:

This report relates to a motion filed by counsel for the plaintiffs on January 3, 1975, for an order to disqualify, as attorneys for the defendant in this action, (1) Donald W. Randall, Esq., and (2) the firm of Weil, Lee and Bergin, Esqs. The motion was referred by you to me for hearing and report by endorsement dated January 14, 1975.

This is an action seeking a declaratory judgment concerning the rights and obligations of the parties hereto under a certain stock purchase agreement dated June 17, 1970, evidently prepared by Mr. Randall while he was in the capacity as internal counsel for the corporation. The basis of this motion is that Mr. Randall, following the termination of his services as house counsel for the aforementioned coporation, became an attorney for the present defendant Mr. Bregman, and in that capacity conferred concerning the merits of this litigation with the principal attorneys of that defendant, the firm of Weil, Lee and Bergin.

The motion, to the extent that it relates directly to Mr. Randall, has become largely academic; for while Mr. Randall at one time seemed to be contending that he was in the posture of associate counsel in this case, has now indicated that he is not appearing as counsel in this case at all (see page 4 of his affidavit filed January 24, 1975). Nevertheless,

as against the outside chance that he might wish to take a different position at a future date, I think it is appropriate that the motion be marked granted as to this defendant. It seems to me elementary that it would be improper for Mr. Randall to represent Mr. Bregman in this case, Randall having previously represented the plaintiff corporation in a transaction which is directly involved in the instant lawsuit.

The question of the representation of the defendant Bregman by the Weil firm is a different matter and involves different considerations. The fundamental question is whether the assumed impropriety of representation of Bregman by Randall in any way would debar representation of Bregman by the Weil firm by reason of consultations which admittedly occurred between the Weil firm and Mr. Randall.

Clearly, the answer to that question would be affirmative if it could be demonstrated that the Weil firm is in a position to rely upon information obtained by it from Randall which was gained by Randall through his prior association with NCK in his capacity as house counsel.

Moreover, even assuming that no such "reliance" can be objectively ~~objectionably~~ proven, the mere fact that the Weil firm conferred privately with Randall concerning the merits of this case, knowing full well of Randall's past service as an attorney for NCK was, in my view, an error in judgment to say the least, since it could be argued that inasmuch as Weil thereby obtained the opportunity to take unfair advantage of NCK, it should be placed in the shoes of Randall whether it actually availed itself of the opportunity or not. Put otherwise, it could be argued that the knowledge of Randall as ex-counsel for NCK is imputable to Weil to the extent that Weil should also be disqualified.

The Weil firm asserts that it would be improper to disqualify it, since the Weil firm never itself represented NCK.

In so arguing reliance is placed on the case of Meyerhofer v. Empire Fire and Marine Insurance Co., 497 F.2d 1190 2d Cir. 1974. In my view that case is no proper basis of great comfort to the Weil firm. The case merely holds that an attorney who occupied the additional status of a defendant in a securities case had the right to make an exculpating statement as a matter of self-defense; and that accordingly, the attorneys for the plaintiff in the securities matter to whom the exculpating statement had been made were not "tainted" by their receipt of such statement.

Here, however, when we are dealing with Mr. Randall, we are not dealing with a litigant, but rather with a former attorney for one of the parties to the instant litigation, who has apparently been assisting the attorneys for the opposing party in preparing a defense to the action. This is clearly not a matter of "self-defense". Since as already noted, it would be highly improper for Randall who at one time characterized himself as "co-counsel" for Mr. Bregman to represent or continue to represent Mr. Bregman, it would be equally improper for him to confer privately with the firm who is presently representing Mr. Bregman.. Since that firm is aware of Randall's prior representation of NCK, I regard it as improper that the dialogues which occurred between the Weil firm and Randall concerning this case were permitted to occur.

That, however, is not the end of the case, so far as this motion is concerned. Assuming, arguendo, that it was - as I believe - unwise for Mr. Randall to have had the conversations which he did have with the Weil firm, simply because such conversations might create an appearance of impropriety, I nevertheless do not feel that this fact alone should automatically result in a disqualification of the Weil firm - which would in effect amount to a deprivation of the defendant's right to counsel of his own choice - absent a showing of some reasonable ground for

apprehension that confidences entrusted to Randall by NCK have been or will be divulged by Randall to the Weil firm.

While indeed such reasonable ground for such fear might exist in litigation in which there was a sharply contested factual issue, we have, in the present case, the special circumstance that the defendant has heretofore filed on October 4, 1974 a motion for summary judgment dismissing the complaint and granting judgment on the counterclaim - a motion based upon the premise that the entire case can be determined by the Court's examination and construction of the underlying contract documents upon which this action is based.

In that context, counsel for Bregman forcefully argues that if, as here appears to be the case, the defendant is relying solely upon documents which, in effect, are known to both parties and speak for themselves, it is difficult for me to see how the plaintiff would have any justifiable basis for a sense of apprehension that confidential information in its possession may be "compromised" by disclosures from Randall to the Weil firm.

I find this argument to be most persuasive. Therefore, it seems to me that this Court ought to hold the final resolution of the matters raised by the instant motion in abeyance until the Court has first ruled on the merits of the defendant's motion for summary judgment. For example, should you decide that plaintiffs are entitled to summary judgment (which you would have the right to do in connection with the defendant's moving for summary judgment) whatever present concern the plaintiff may have respecting representation of Bregman by the Weil firm would obviously disappear amid the joy of victory. If, on the other side of the coin, you were to grant summary judgment in favor of the defendant solely on the basis of the content of the documents before you, it would then be clear that the rights of plaintiff had not been, and could not be, effectively "compromised" as a result of any communications between Randall and the Weil firm.

Should you, however, decide that there are triable issues of fact and accordingly deny the pending motion for summary judgment, it may well be that the matter of the propriety of Weil's continuing representation of the defendant Bregman would then have to be reconsidered in the light of your opinion denying the motion.

I therefore recommend that the motion by the plaintiffs to disqualify the firm of Weil, Lee and Bergin be denied at this time, without prejudice to renewal of said motion in the event that this case is not disposed of incident to your consideration of pending motions for summary judgment.

As hereinabove indicated, the motion should be marked granted to the extent that it seeks to disqualify Donald W. Randall, Esq. from further representation of the defendant herein.

Copies of this report have been mailed this date to counsel for the interested parties, who are hereby instructed that any objections hereto must be filed in your chambers within ten days from the date hereof.

The following documents considered by me on this motion are forwarded herewith:

1. Plaintiffs' notice of motion to disqualify, filed January 3, 1975 with your referral endorsement filed January 14, 1975;

2. Plaintiffs' memo of law in support of said motion filed January 3, 1975;

3. Affidavit of Ronald W. Randall in opposition, filed January 24, 1975;

4. Affidavit of Gilbert H. Weil in opposition, filed January 24, 1975;

5. Defendant's memo in opposition, filed January 24, 1975;

6. Plaintiffs' reply memorandum, filed February 3, 1975;

7. Three volumes consisting of xerox copies of transcripts of depositions submitted for my consideration in connection with the merits of the motion;

8. Folder containing defendant's deposition exhibits numbered 9 through 11;

9. Folder containing plaintiffs' deposition exhibits 13 through 43.

Dated: New York, N.Y.
March 4, 1975.

Respectfully submitted,

HAROLD J. RABY
UNITED STATES MAGISTRATE

cc: BISCO, WINKLER & HIGGISTON, ESQS.
645 Madison Avenue
New York, N.Y. 10022

WEIL, LEE & BERGIN, ESQS.
60 East 42nd Street
New York, N.Y. 10017

Additional pages of transcript

of Deposition of Donald W. Randall

more explicit as to what "prepared" means.

Q What have you done to get ready for testifying today?

A What have I done? I have read the transcripts of the depositions taken in this action of Mr. Bregman and Mr. Norman B. Norman who testified in his capacity as president of the plaintiff company.

Q Is that all?

A I also discussed certain questions which occurred to me as a result of reading those depositions with counsel for -- I might say co-counsel for Mr. Bregman which is the firm of Weil, Lee & Bergin.

Q Who is the other counsel?

A Me.

Q When did you become counsel?

A On or about July 15, 1973.

Q Which was the exact date of the termination of your employment with NCK?

A Correct.

Q You were just waiting for that date to become counsel for Mr. Bregman?

MR. WEIL: I will object to the form of that question, too.

A I don't think that is a question that I have to answer.

Q You do have to answer it.

A I was not waiting for that date, no.

Q How did it happen that you became counsel on July 15, 1973?

A I will tell you precisely how it happened.

Q Please do.

A It happened on that date because Mr. Bregman, a very knowledgeable fellow, realized that any representation by me of him in any -- certainly in any capacity having anything to do with NCK would have been questionable.

Q Questionable in what way? DR

A From a professional ethical standpoint, and I don't think I need to explain. Therefore, Mr. Bregman very studiously avoided having any discussion with me of any such representation until such time as I was no longer an employee of NCK.

Q Did you avoid having discussions with him until you were no longer an employee?

A Discussions about what?

Q You just said any discussions with you. Discussions about his business --

A I think if the reporter will read it back, I said any discussions about such representation. It is DR obvious that since our relationship, that is my relationship

with Mr. Bregman, continued all during this period, we certainly had discussions with one another. However, we had no discussions prior to July 15, 1973 either on my part or his part of any such legal representation in connection with any matter.

Q In other words, you both kept that very neutral, the subject of your representing him --

MR. WEIL: Objection to the form.

Q -- until July 15, 1973?

A I didn't use the word neutral. I simply said we never discussed it, and that is my answer.

Q You both knew the reason for not discussing it?

A Since we never discussed it, I am not sure that anybody knew the reasons because we never discussed the reasons.

Q You just said that Mr. Bregman is a pretty smart fellow, and he knew enough that it would be improper or unethical or something like that to talk to you before July 15.

A He so told me on July 15.

Q What did he say?

A He said I have not raised this with you up until now because I knew that it would be improper to do so.

However, now you are no longer an employee of NCK and therefore, you are a free man. I said yes, Walter, and I said there is no barrier ~~to~~ of my representing you to the extent that it doesn't betray any professional confidences or whatever, and that was the sum and substance of our discussion at the time.

Q Do you really think that beginning July 15, 1973 you were free to represent Mr. Bregman personally against the company in the same ~~manner where~~ matter that you worked for the company?

A I had no qualms about it whatsoever. I might point out I fail to see how this line of questioning is germane to the issues in the pleadings that I have seen.

Q You said, to come back to the subject of preparing to testify, that you had a discussion with co-counsel, did you not?

A Yes.

Q Where did that discussion take place?

A At the offices of Weil, Lee & Bergin.

Q How many times had you been in their offices?

A Three, four, perhaps.

Q Starting when?

A Somewhere in or about November 9, 1973.

Q At the time that Mr. Bregman decided to

A I didn't.

Q You went with him on the occasion of his first visit, did you not?

A No, I didn't.

Q When did you go?

A When? I have already told you. It was in or about November 1973.

Q Had Mr. Bregman been there before?

A I have no idea.

Q Couldn't you tell from the drift of the conversation?

A I knew that he had already talked to Mr. Weil specifically, but whether he had been in Mr. Weil's office, that is --

Q What was your purpose in going there?

A My purpose was to discuss the action which had been commenced by NCK and Mr. Greene against Mr. Bregman.

Q That wasn't until December or January?

A In that case --

Q After Mr. Bregman sought to exercise his option.

A In that case, I modify the answer to conform to whenever the suit was filed. I made no record of this. Therefore, it could just ~~have~~ easily been December. I am

quite certain it was before the year end because I am quite sure at that time declaratory judgment action was brought before the year end.

Q Have you received any fees from Mr. Bregman?

A No.

Q Have you ever billed him?

A No.

Q Are you going to?

A Yes.

Q When will your bill date from?

A July 15, 1973.

Q Did you assist Mr. Weil or Mr. Hefner or anybody else in the office or try to assist them in the prosecution of their defense and counterclaim against the plaintiffs in this action?

A I was called upon for advice and I guess I gave it. I know I gave it.

Q By whom were you called upon for advice?

A Mr. Weil and Mr. Bregman.

Q You gave advice to Mr. Weil?

A I don't know whether you would characterize it as my giving advice to Mr. Weil or my giving advice to Mr. Bregman because I believe that on one or two occasions in question they were both in the same room.

Q During the discussions with Mr. Weil or Mr. Hofner or Mr. Bregman from October 1973 on, did the subject of the June 17, 1970 agreement ever come up?

MR. WEIL: I will have to object to that, not on grounds of form, but I think at this point we are getting into attorney-client privilege.

MR. BISCO: It has been waived.

MR. WEIL: How?

MR. BISCO: By Mr. Bregman.

MR. WEIL: Where did he waive it?

MR. BISCO: I will show you. I have a memorandum on this subject. Pages 28, 29, 30, 31 and 52 of his testimony, he testified fully as to advice given to Mr. Bregman -- by Mr. Randall on the subject of his rights against Mr. Greene.

MR. WEIL: If you just give me a moment to look at those pages.

I don't find any reference there, waiver, or disclosure by Mr. Bregman of the -- as to any conversations that took place between him and his attorneys.

MR. BISCO: And Mr. --

MR. WEIL: Including Mr. Randall.

MR. BISCO: Mr. Randall is the one I am referring to.

MR. WEIL: Including Mr. Randall at the end of 1973, November or December of 1973. The references you have given me are only to June -- or July of 1973. You are now --

MR. BISCO: Don't you think that is enough?

MR. WEIL: No, I don't think that is enough.

MR. BISCO: We are going to get a ruling on that.

You are wrong. You had forgotten about it.

MR. WEIL: I have not forgotten about it. It doesn't matter if I did.

MR. BISCO: You did.

MR. WEIL: What do you base that on?

MR. BISCO: You wouldn't have raised any question of privilege.

MR. WEIL: That doesn't mean I have forgotten about it.

MR. BISCO: Here is a memorandum of law for you.

MR. WEIL: It doesn't cover the point. At the most, you would have a waiver as to discussions which Mr. Bregman had with Mr. Randall in July of 1973, but you are now asking him to reveal discussions which were had at a meeting among Mr. Randall,

who was still Mr. Bregman's counsel on a much later date, nearly half a year later, in the presence of another and new attorney for Mr. Bregman at that time.

There has been absolutely no waiver, no disclosure, no discussion by Mr. Bregman of the discussions which took place at that later meeting and hence he has not waived them.

MR. BISCO: You have made your point, but I insist on it.

MR. WEIL: We will have to get a ruling.

MR. BISCO: Suppose we go ahead with something else.

MR. WEIL: I think that would be advisable.

MR. BISCO: Read the last question and answer so I know exactly what it is.

(Record read back.)

MR. BISCO: Let me ask this question on the record.

In view of your objection, we will pass that point, and I will reserve all rights to it because we will have to get a ruling on it.

MR. WEIL: That is correct.

MR. BISCO: Do you agree, I take it, that Mr.

based on that.

MR. WEIL: Off the record.

(Discussion off the record.)

A I was only restating or stating for the record that I am in the same position as Mr. Weil in that I can't waive Mr. Bregman's rights with regard to attorney-client privilege, and in the absence of a clear waiver, which I don't think has been established, I would have to decline to answer questions that I believe come within the scope of the attorney-client privilege.

Q As long as you are reading Mr. Bregman's testimony, finish reading it because I am going to ask you questions about what he testified to.

A I am reasonably familiar with the testimony.

Q You have read this testimony?

A Yes, I have.

Q Did you have a conversation in or about the month of July 1973 with Mr. Bregman on the subject of his rights against Mr. Greene?

A No.

Q When did you have such a conversation, if at all?

A On or about October 3, 4, 5. Early October 1973.

Q What was the occasion for the conversation?

A Walter had been fired.

Q Then for the first time you spoke to him about his rights against Greene, is that right?

A Then for the first time, we discussed his rights against Mr. Greene.

Q What did he say to you and what did you say to him?

A I don't think I can tell you that.

Q Why not?

A Because I was at that time functioning as Mr. Bregman's counsel.

Q Mr. Bregman has waived that.

A No, he hasn't. Not as to any conversation in October after his employment had been terminated in accordance with his contractual agreement.

Q You just said that you didn't have such a conversation in July 1973.

A Right.

Q That the first time you had it was after he received the notice of October 3 terminating his employment, right?

A Right.

Q You don't think that comes within his testimony?

A Not at all.

MR. BISCO: We will have to get a ruling on that. Mr. Weil, your people can talk alone if you want, but that is getting silly.

MR. WEIL: We don't need to talk alone, and it is not at all silly. Mr. Randall, you have Mr. Bregman's deposition before you there.

You have it open to the pages that we have been discussing in which he referred to a conversation with you which he placed as being sometime in July of 1973.

THE WITNESS: Right.

MR. WEIL: From the substance of his description of the conversation with you at those pages, can you identify it as being the conversation that you have told us took place between you and him in October of 1973 after he had been fired?

THE WITNESS: No.

MR. WEIL: I am afraid I must disagree with you. I don't think it is silly at all. In fact, I think it is a very firm requirement of our professional responsibility.

THE WITNESS: If I may gratuitously refer to Mr. Bregman's answer at Line 3 on page 29 of his deposition, he says:

"I asked him if I could exercise my Greene options after resignation or just prior to resignation because I was planning to resign."

I had no discussion with Walter Bregman about his right to exercise that option upon his resignation or his planned resignation at any time.

Q Then Mr. Bregman is mistaken in his testimony to that effect, is he not?

A He must be.

Q I call to your attention the testimony of Mr. Bregman at page 52 reading as follows:

"Q You just thought you had a secret advantage?

'A I didn't think it was secret. I thought the other people had the same deal I had.

Q Did you believe Norman believed it?

A I didn't think Norman believed it.

Q The reason that you thought the other people believed it was that Randall told you?

A Yes, he told me in July 1973. Yes."

Did you tell anything like that to Mr. Bregman in July 1973 or at any subsequent date?

MR. WEIL: I will object to any subsequent date.

A Limiting my answer, the question is did I in July of 1973 tell Bregman that other people had the same deal and those words are quoted from his testimony. The answer is no.

Q What did you tell him at that time?

A Nothing.

Q He didn't ask you anything?

A The question never came up in July 1973 or at any time prior to July 1973.

Q When did it come up?

A Subsequent to July 1973.

Q When?

A Sometime in October.

Q Was it prior to the time he had engaged Mr. Weil's firm?

A Yes.

Q What was the conversation?

A I decline to answer on the ground it is privileged.

MR. BISCO: Mr. Weil, it is just a difference in date. There was such a conversation. The date was not July 1973. It was before you got into the case.

A You have --

MR. BISCO: This is what he testified to.

A I realize that if I answer these peripheral questions, I run the risk of waiving a privilege which is not mine to waive. Therefore, I must decline.

MR. BISCO: Mr. Weil, you are the attorney of record for Mr. Bregman in this litigation.

THE WITNESS: I am not.

MR. BISCO: He is not. He is cocounsel with you, but he is not the attorney of record. I think it is up to you speaking for Mr. Bregman whether or not you claim privilege on that question.

MR. WEIL: First of all, I can't speak for Mr. Bregman on that. I have no authority to waive the attorney-client privilege and it would be unethical for me to do so without Mr. Bregman's permission which I don't have.

MR. BISCO: On that, we will -- I can see we won't finish tonight. You can have an opportunity to discuss that with him to see whether he waives that, and you will have Mr. Randall's testimony which is that he had such a conversation but it was at a different time, and he is insisting on his own privilege.

Now, let the client say.

MR. WEIL: I agree that the client should say, but I think perhaps we are not quite on the same wave length and I don't know which of us is off of it, on what Mr. Randall did say, and also my own position.

I have said that what Mr. Bregman testified to in that passage of his deposition was what he believed Mr. Randall had told him with regard to the rights of others on the Greene stock and to the extent that he has testified to that, he has waived privilege as to that particular conversation --

MR. BISCO: Excuse me. He also testified in his deposition as to what Mr. Randall supposedly told him about his own rights.

MR. WEIL: I don't believe so.

MR. BISCO: I think so.

MR. WEIL: That was back in July. Now, I ask Mr. Randall whether the description by Mr. Bregman of that discussion, of the contents of that discussion, enables Mr. Randall to identify that discussion as the one that actually took place in October rather than in July, if it did.

If Mr. Randall looking at that description in the Bregman deposition can say yes, this is the

conversation I had with him, only it was in October, not in July, then I would agree that despite the discrepancy in dates, that Mr. Bregman would have waived the privilege.

MR. BISCO: Except that you are a little strict there in saying if that is the conversation that he had in October instead of July, then Mr. Bregman has waived the dates. It might have been on the same subject. His recollection might be somewhat different, but certainly the subject of that conversation has been already waived by Mr. Bregman.

MR. WEIL: I disagree. I don't think the fact that a client who has had a number of discussions with his lawyer within the attorney-client status over a period of time waives later discussions by waiving what took place in one of the earlier ones.

MR. BISCO: You are contradicting yourself because you just said that it appears to be a mistake in date.

MR. WEIL: As to the conversation.

MR. BISCO: He doesn't have to agree exactly with the conversation. If that conversation in some

form or some substance was had at a later date, he ought to testify to it.

MR. WEIL: Yes, that particular conversation.

MR. BISCO: Yes, but he refuses to say anything.

MR. WEIL: He answered in response to my question that he doesn't identify any October conversations as being the conversation described by Mr. Bregman on the date of July.

A That is why I refer to the language on page 29 which places it in the context of Mr. Bregman contemplating resigning from the company, which must necessarily have been a conversation that took place before he got fired.

MR. WEIL: Obviously, the circumstances and the substance of the attorney-client discussion were quite different, and therefore, Mr. Bregman has not waived the privilege as to the one that actually or any that actually took place after he had been fired, the circumstances being different, and on the particular date you have asked for, the meeting at my office, even with different counsel included.

MR. BISCO: I call to your attention the testimony of Mr. Bregman at pages 28 and 29

of his deposition:

"Q And you thought that you had an advantage through the options and that the others had the same advantage?

"A Yes, and in fact, I said this to them some five or six months later.

"Q You did?

"A Yes.

"Q To whom?

"A Myers, Roncarelli.

"Q You told them you had the right?

"A I said I think we all have the right to quit and exercise the Greene options.

"Q And you paid no attention to the fact that the standard stockholders agreements provide for a holding of 36 months?

"A Not in my conversations with them.

"Q Did they agree with you?

"A They seemed very pleased.

"Q Did you base that on any advice that you had received from anyone?

"A Yes. I asked Don Randall about it.

"Q When?

"A It would have to be after July 1 of 1973.

So it was probably in the month of July 1973.

"Q What did you ask him?

"A I asked him if I could exercise my Greene options after resignation or just prior to resignation because I was planning to resign.

"Q What did he say?

"A He said as far as he could tell, the Greene options were outside the bounds of any agreement that I had. I didn't ask him as to Roncarelli or Myers because they were not paying him."

MR. WEIL: Then I think that pretty clearly sets the limits and I will agree that he has waived, that Bregman has waived the privilege insofar as the conversation that he had where Mr. Randall is concerned to the extent that it covers the subject of whether Mr. Bregman could exercise his Greene options after resigning or just prior to resigning. That is the -- those are the limits of the conversation and discussion as to which he has waived the privilege.

Q Having just read that to you, and you having heard Mr. Weil, can you answer whether you ever had such a conversation with Mr. Bregman?

A No.

same question.

Q You can't answer it?

A I can answer whether or not. The answer to whether or not I had any such conversation is no, I didn't.

Q Mr. Bregman then is mistaken --

A He is mistaken.

Q -- in his testimony as to what you supposedly said to him, is that correct?

A He is mistaken.

Q From July 1973 and thereafter you had very much in mind the provisions of the June 17, 1970 agreement, did you not?

A When?

Q July 1973 and thereafter.

A No, not from July 1973.

Q From when?

A From on or about October 5, 4. Early October 1973.

Q What brought that agreement to your attention in October 1973?

MR. WEIL: I will object to that question if the answer involves any disclosures by or discussion with Mr. Bregman on the subject.

THE WITNESS: I will answer the question within those limits, which is that my concern for

the June 1970 agreement at that time, early October, came about because I got a telephone call from Walter Bregman saying Norman just fired me. When can we get together?

Q How did that give you concern about that agreement?

A Because thereafter, the June 1970 agreement became a subject of conversation.

Q Who produced the agreement?

MR. WEIL: I think I will have to object to that too, Mr. Bisco. That is beginning to go into what took place between the client and his attorney.

Q Did you find the agreement yourself?

MR. WEIL: I will make the same objection. You are simply going at the same thing from the reverse direction.

MR. BISCO: I am excluding the client.

MR. WEIL: Even excluding the client involves a negative --

MR. BISCO: It doesn't involve any communication.

MR. WEIL: It would. If he says that he didn't bring it up, then that would imply that the

client brought it up and brought it to his attention, which would be a communication.

MR. BISCO: Do you object on the ground of privilege?

MR. WEIL: Yes.

Q Are we to believe from your testimony that you had forgotten the June 17, 1970 agreement sometime after it was executed?

A I don't know what you are to believe. I am not sure that that is a question that is susceptible of a yes or no answer.

Q I will ask you a question --

A If you wish to ask me on any given day whether I had that document in mind, I suppose I will try to answer that question.

Q Had you forgotten that agreement in 1970?

A It was written and dated 1970, right.

Q Yes.

A So I certainly had not forgotten it in -- while I was in the process of writing it. How long thereafter it took me to forget it in the sense of it, shall we say, receding into my subconscious, I can't really speculate.

Q I don't know what you mean by receding into your subconscious, but did you ever forget that agreement?

MR. WEIL: I will object to the form of that question. If you want, I can point out why. The reason is the word forget. I don't know what is meant by the word forget in that question.

MR. BISCO: It is a plain old-fashioned word.

MR. WEIL: No. It isn't all that plain. It isn't all that old-fashioned. Maybe it is old-fashioned, but it is not a simple word. One can put something out of his mind for periods of time without having forgotten it.

Q I am going to ask you the question. Can you answer the question whether you had at some point after the preparation and the signing of that agreement of June 17, 1970, had you forgotten it?

A We are flogging the same horse.

Q Can you answer the question?

MR. WEIL: Do you know what Mr. Bisco means by forgotten?

THE WITNESS: No, I don't know what he means by forgotten.

MR. WEIL: Maybe Mr. Bisco will tell us.

Q Did you remember that there was such an agreement without remembering all its terms?

A Remember, I assume, in your lexicon, the opposite

of forget.

Q Would you please, in your wisdom, suggest to me some words that I should use to find out what I am trying to find out?

A Let's go off the record for a second.

MR. BISCO: Off the record.

(Discussion off the record.)

A If you would like to ask me whether on a particular day or certainly in a narrow time frame whether I had in mind this particular June 1970 document, then I will attempt to answer that question.

Q Did you have in mind the June 17, 1970 document in July and August and September 1972?

A 1972?

Q Which is the time of the Kaplan transaction?

A No.

Q You had forgotten it?

A I didn't have it in mind. Had there been occasion to remember it, I probably would have remembered it, but there was no occasion, to my recollection, for me to remember that document. So I suppose in your language -- I forgot it.

Q You have carefully prepared an answer to say that in my language you forgot it because you know

(Discussion off the record.)

that you never told anybody about the existence of that agreement and everybody else was ignorant of it.

A I what?

Q You never told anyone of it.

A Let's again-- first of all, I think you are suggesting something I don't particularly like, and again just to be neat about it, let's have some time periods during which I am alleged to have done or not done whatever it is you allege, which again is getting pretty far afield from this proceeding, but nevertheless, you are paying for the transcript.

Q You will pay your share too.

MR. WEIL: No. I think you are supplying us with our copy.

MR. BISCO: Is that so?

Q Do you remember receiving the letter which I now show you from Mr. Winkler on or about August 25, 1972?

MR. HAFNER: I believe that that letter was introduced as Plaintiff's Exhibit 12, August 25, 1972, is that right?

MR. MESSER: That is right.

A The question is?

Q Do you remember receiving that?

A I certainly received it. My recollection is not

Q Exhibit 7.

A -- Plaintiffs' Exhibit 7, and not having had a great deal of time to think about it, it's not completely clear to me that the failure to refer to the June 1970 agreement, which is --

Perhaps we should identify it.

MR. HAFNER: Plaintiffs' Exhibit 3.

A Plaintiffs' Exhibit 3 was an omission.

Q What do you mean by that?

A What I mean is that it's not clear to me, on the basis of my quick look at this, that it was necessary in the context of this subordination agreement to have referred to the June 1970 agreement, assuming that anybody even thought about it.

Q Well, you better explain some more. That is not clear to me.

A I'll try it once more.

Q Are you trying to say that you forgot about the June 17, 1970 agreement?

A I'm not sure. It's entirely possible that I thought about it and decided it wasn't necessary to refer to that document, but on the other hand I may very well have completely overlooked the existence of the June 1970 agreement.

for referring to the June 17, 1970 agreement?

A Right.

Q I call to your attention that that agreement purports to modify the agreement of October 25, 1967 with no reference to the agreement of February 6, 1968 in respect of the length of time stock must be held in order to give a purchase price of current book value, in the terms of payment which become one-fifth a year, rather than $20,000 a year, and prime rate of interest rather than 4 percent interest.

Don't you think it would be necessary to call to the banks' attention the differences in the agreements and to refer specifically to the June 17, 1970 agreement?

A No, frankly I don't think my opinion at this point is relevant.

Q Isn't it more likely that you forgot or did not have in mind the provisions of the June 17, 1970 agreement when you drew the subordination agreement?

A That is a possibility, as I've already testified.

Q But isn't it a more likely possibility --

MR. WEIL: I object to that as being argumentative.

A Yes.

Q And you rode into the office every day with him in a car?

A Yes.

Q And --

A No, not necessarily every day but for the most part.

Q Pretty much every day, and you rode him with him pretty much every day, did you not?

A Yes.

Q And you visited with him socially, frequently during that time?

MR. WEIL: I'll object to the word frequently.

A All right, from time to time.

Q Yes. Did Bregman know of the difficulties you were having with Mr. Norman?

A Oh, I don't think there's any question that Mr. Bregman knew, although you'd have to really ask Mr. Bregman, but it was quite apparent to me that Mr. Bregman knew of these difficulties and in fact I can surmise with certainty that Mr. Bregman knew more about these difficulties than I did at that time.

Q Do you know whether Mr. Bregman also was

Mr. Myers participated only really peripherally, in which the attempt was made to identify some of the problem areas or questions.

I will say that at that time Mr. Myers wasn't all that certain about his own position with the company. So there was some talk about the possibility that Mr. Myers might decide that he wouldn't stay with the company either. But that -- nothing came of it and, as you will recall, within a fairly short period of time thereafter, within perhaps a week, Mr. Myers' position became solidified, if you will, by the assuming presidency of the company.

Q What was the discussion of the option?

A The question came up about the Greene option and, was it, in effect, was it worth anything to either Bregman or Myers.

Q Right. What did you say?

A My advice to Mr. Bregman was that by virtue of the June 1970 agreement, it appeared that the option might be worth something to him if he chose to exercise it. And I told Mr. Myers that, because he did not have any agreement with the company comparable to the particular provision of the June 1970 agreement that he, in my judgment, had a very much more dubious, was in a much

more dubious situation as far as the Greene option being of any value to him.

Q Is it your best recollection that that is the full discussion on the subject?

A Yes, that was the gist of it.

Q Now, you advised Mr. Bregman on the basis of the June 17, 1970 agreement --

When had you looked at that?

A At some point obviously prior to October 3rd, or whatever that date was.

Q Where did you get it from?

A I think Mr. Bregman gave me a copy of it.

Q Mr. Bregman then consulted you before October, 1973?

A Wait a minute now, let's go back.

The meeting that I've just told you about did not take place on October 3rd or whatever that date happens to be, or the discussion. It was within a very few days thereafter, perhaps a couple of days.

Q Well, it was before you wrote the letter to NCK, stating what you considered to be Bregman's rights and how the transaction should be handled, isn't that right?

A Yes, it was sometime between the 3rd and the 8th,

and so the meeting in question took place somewhere in that period.

Q Where was it held?

A It took place at my house.

Q And you said before that you had read the June 17, 1970 agreement.

I want you to fix the time as precisely as possible.

A I think I had reread it. The best recollection I have is that Mr. Bregman brought a copy of it; had a copy of it with him.

Q Then your best recollection is that you read it at the meeting?

A That's the best recollection I have right now.

Q Or, I should say, you reread it at the meeting between October 3rd and October 8th?

A Right.

Q And you immediately felt that Mr. Bregman had some rights if he exercised the Greene option?

A I so advised him, yes, sir.

Q And didn't you have such an opinion at the time the various papers were being signed, in August 1972?

A If I had been called upon to render such an opinion, that might have been my opinion.

I was not called upon to render any such opinion, nor to my recollection did I have any occasion to even think about it at that time.

Q So you were silent on the subject?

A I didn't think about it.

Q You didn't tell anything about Bregman's possible rights if he didn't sign anything --

A I didn't think about it.

Q -- to Beresford, Winkler, or anybody else?

A I didn't think about it.

Q You did not tell them?

A I didn't think about it.

Q And when you did think about it, you thought he had some rights?

A Fourteen months later, yes.

Q And then did you tell anybody connected with NCK about it?

A Then meaning --

Q At the time you formed your opinion.

MR. WEIL: October of '73?

MR. BISCO: Yes.

A Did I tell anybody?

Q Yes.

A At NCK?

Q Yes.

A No.

Q Or Mr. Winkler, you didn't tell him?

A I'm quite sure I didn't.

Mr. Winkler is just as capable as I --

Q Except that he didn't know as much as you did.

He did not know about the June 17, 1970 agreement?

A I'm not even sure that that's true. If you would like to swear Mr. Winkler in --

Q What makes you sure it isn't true, what makes you not sure it is so?

A Because Mr. Winkler had, subsequent to the execution of that document, ~~had~~ as much access to it as I did.

Q Did you ever give him a copy of it?

A No. Whether he ever got a copy, I don't know, but I never gave him a copy.

Q Was it your feeling that when the August 31st papers were being signed, which you signed as vice-president, that Bregman might have some rights if he exercised the option?

A I told you I didn't think about it. You asked me that question before, I think, or substantially the

same question.

Q You were then the house counsel for NCK and NCK Organization?

A Yes.

Q On a full time basis?

A Yes.

Q You were being paid a full time salary?

A Yes.

Q How much was it?

A At that time?

Q Yes.

A It was $47,500. a year, approximately.

Q Okay.

(Discussion off the record.)

Q Did you prepare Exhibit 5, the letter to Norman by Bregman, dated October 8, 1973?

A I prepared a draft of this document. ~~of~~ the extent to which the final document is my language or may reflect changes made subsequently by Mr. Bregman, I can't say with specificity.

Q But you worked on it?

A I certainly did.

Q And you prepared a draft?

A I did.

Q And this is at least substantially in the form of your draft?

A I would say this is substantially in the form of my draft, yes.

Q Now, you state in Paragraph 6 of that letter "All shares of stock of NCK Org. held by me on January 2nd, will be purchased by NCK Org. at a price per share, equal to the book value of such stock at December 31, 1973."

Had you by that time formed an opinion that Bregman might have some right to purchase the stock and tender it to NCK at book value as of December 31, 1973?

A I think I had, based on the chronology.

Q And did you intend that he would exercise his Greene option?

A I don't think that decision had been made at that point. That was Mr. Bregman's decision, not mine.

Q You did not know how many shares were being referred to, you did not know whether it was only the 30,000 that he had purchased, that we have talked of before, or whether it also included stock he would purchase from Greene under his option?

A The answer to that is yes, I didn't know at that time.

Q When did Mr. Bregman make up his mind that he had possible rights and that he was going to attempt to exercise them?

A I would say that was sometime during the month of October.

Q Was it after he consulted Mr. Weil's firm?

A I would say that at the time when Mr. Bregman first consulted Mr. Weil's firm, and this is based on my understanding of what was in Mr. Bregman's head at that time, so therefore it's subject to certain risk of error. It was my understanding that he had at least made a tentative decision that he was going to attempt to exercise the option. but I don't think that that decision was irrevocable, perhaps even right up to the day when he sent a letter, or whatever it was that he sent, to Mr. Greene advising him of the exercise of the option.

Q Do you know what the tentative decision was based on, was it his own opinion or based on anything you said?

A I'm sure it was based to some extent on my --

MR. WEIL: I am going to caution the witness not to get into any privileged areas.

A All right, I'll say that I'm sure it was based to

some extent on advice that I gave him in the role of counsel.

Q Between October 3rd and October 8th as you testified before?

A Or possibly subsequent to that.

Q Now, in the light of your letter of October 8, 1973 --

MR. WEIL: It's Mr. Bregman's letter.

Q In the light of Mr. Bregman's letter, which you drafted. which is Plaintiffs Exhibit 5, when do you say that you first contacted the office of Mr. Weil?

A I never said that I contacted the office of Mr. Weil.

Q Well you went there, didn't you? You went there with Mr. Bregman?

A Yes.

Q You said that?

A Yes.

Q Well, in relation to the timing of the letter of October 8th, when did you go?

A It was -- obviously it was after October 8th. How long after I really have great difficulty remembering.

I have trouble placing it more specifically than to say that it was probably the latter part of October or

early November.

If, for example, I knew the date of the letter that was ultimately sent to Mr. Greene --

Q It was before that, wasn't it?

A. It would have been before that, yes.

Q Because Mr. Bregman had not finally made up his mind that he was going to try to exercise his option, is that right?

A I think that's true, yes.

Q Did you tell Mr. Weil that you were former house counsel for --

A Oh, yes.

Q And that you had been discharged and your discharge was effective July 15, 1973?

A I'm not sure of the details that I gave Mr. Weil, but he was under no delusions whatsoever as to who I was and what my former position had been with the company. In fact, it was a matter of specific conversation between Mr. Weil and me.

Q Now, it appears from testimony before that Mr. Bregman sent a notice to Mr. Greene on November 5, 1973.

MR. BISCO: Is that an exhibit?

MR. HAFNER: I don't think that we --

(Discussion off the record.)

MR. BISCO: I do not think it was marked.

Q I show you a copy of a letter of Mr. Bregman to Mr. Greene, dated November 5, 1973 on stationery of NOrman, Craig & Kummel, Inc., in which Mr. Bregman states that he is exercising his option to purchase 5,000 shares of Class B Common Stock of the organization and I ask you if you saw the original?

(Referring.)

A Yes, I've seen it before.

MR. BISCO: Let us mark it for identification, Plaintiffs' Exhibit 31-A and B.

(Document above referred to was marked Plaintiffs' Exhibit 31-A and B for identification, this date.)

Q When did you first see Exhibit 31 for identification?

A I'm quite sure that I saw a copy of this letter within a very short time after it was sent to Mr. Greene.

Q Did you participate in the drafting of that letter?

A I am quite sure I did.

Q Well did you or didn't you? You know whether you did.

A I know that I participated.

The question I have in my mind is whether I did the draft and somebody else commented on it or somebody else did the draft to wit: Mr. Weil, and I commented on it, but I did participate in it.

Q But you participated in the framing of that letter before it was sent?

A Yes.

Q With Mr. Weil?

A With Mr. Bregman.

Q Not with Mr. Weil?

A And Mr. Weil.

Q How many times did you visit the office of Mr. Weil?

A How many times when, during what period?

Q During the period from the end of October when you started, 1973, until now.

A Until today?

Q Yes.

A Well, I think we have to take it back.

Q Take it by years if you want.

A Just to avoid misconceptions or whatever, during the period from the first meeting whenever that was, the latter part of 1973 up to, I would say, September of

this year.

Q Just a moment. You said the latter part of 1973?

A Yes.

Q It must have been before November 5, 1973.

A I've already testified that my first visit to Mr. Weil's office in company with Mr. Bregman was either late October or early November of 1973, which is consistent with this date.

Q Then take it the way you want.

A From that point up until, say, September of this year when I received word that --

Q -- we wanted to take the deposition.

A -- that you had served a notice to take my testimony as a witness, I would say that I was in Mr. Weil's office no more than three times.

Q From when?

A From on or about or somewhat before November 5, 1973 through September 1974.

Q All right. Were you in his office after September 1974?

A Yes, I've been in his office several times in connection with my testimony as a witness, as recently as this morning.

A Absolutely not.

Q Your fees are whatever you bill Mr. Bregman, is that right?

A My fees are whatever I bill or will be whatever I bill him for my services rendered directly to him, in the matters apart from this litigation.

Q You prepared your own recollection, I take it, of the standard agreement of Walter E. Bregman, dated October 25, 1967, with the NCK Organization, Ltd. and gave it to Mr. Hafner or Mr. Weil in, I don't know when you did.

Is this a copy of what you worked out for them? (Referring)

A You have shown me a Xerox or other photocopy of one of the printed stockholders agreement forms which was in use by the NCK Organization, Ltd., and on the face of it it says in my handwriting "Conformed Copy" and then it appears to have been conformed in my handwriting so as to correspond with the agreement between Mr. Bregman and the company dated October 25, 1967.

To that extent I can identify the document.

Q Were you asked to prepare such a document?

A I have no specific recollection of having been asked to prepare this document, but let's say that there

material
~~term~~ respects, and furnished it to Mr. Weil. Dust

MR. BISCO: Suppose we mark the agreement and the letter.

The stockholders agreement will te marked Plaintiffs' Exhibit 32 for identification, A through D.

(Document above referred to was marked Plaintiffs' Exhibit 32-A through D for identification, this date.)

MR. BISCO: Also mark Plaintiffs' Exhibit 33, Mr. Hafner's letter to me dated June 19, 1974.

(Document above referred to was marked Plaintiffs' Exhibit 33 for identification, this date.)

Q Where did you prepare Exhibit 32-A?

A Where did I prepare it?

Q Yes, the one you have just seen.

Where was that done, where was the work done?

A I would imagine it was done in my home.

Q Not at Mr. Weil's office?

A I doubt it very much.

Q Now, you sent that to Mr. Hafner or Mr. Weil, did you not?

A I either sent it to him or I handed it to him.

Beresford, Walter W. Bregman, Thomas K. Myers and Edward A. Roncarelli respectively amending their stockholders agreements with the corporation."

A Yes, I see that.

Q Is that correct?

A I think not.

Q What is incorrect about it?

A Mr. Bregman's name is listed and to the best of my knowledge no such agreement between the corporation and Mr. Bregman was ever signed.

Q How did you come to put his name in there?

A It is just barely possible that I made a mistake.

Q Why is it only barely possible?

A Because I usually do not make mistakes.

Q You do not know for a fact that Mr. Bregman did not sign an agreement, do you?

A No. That would be knowledge within Mr. Bregman's mind.

Q I think you may want to make a correction. It is up to you, ~~at~~ A page 180 of your last testimony. You said in lines 5 to 7 in answer to the question your fees are whatever you billed Mr. Bregman, is that right? "Answers: My fees are whatever I bill or will be whatever I bill him for, my services

rendered directly to him, in the matters apart from this litigation." Aren't you going to bill him for the litigation?

A I think the answer, even though there is a comma that really doesn't belong there, a comma after the word "for" at line 6, but aside from that I think the answer is what I intended.

Q That you are not going to bill him for this litigation?

A I think that is what it says.

Q I know. Do you really intend that?

A That is what I said.

Q Do you want to change it?

A No, I don't want to change it.

Q You are not going to bill him for this litigation?

A I don't know what you are driving at but I don't intend to bill Mr. Bregman for any legal fees in connection with this litigation because I am not representing Mr. Bregman in this litigation.

Q You said you were co-counsel.

A I recall using that term and my intention when I used that term, which may be --

MR. WEIL: Can we refer to that part of

the transcript. Off the record.

(Discussion off the record)

A If it is all right with you, we can strike the answer that I started to give and I can answer it again referring to the page in the previous testimony.

Q I don't know. Did you use the term co-counsel, that you were co-counsel in this litigation, didn't you?

MR. WEIL: He did not say he was co-counsel in the litigation.

MR. BISCO: All --

MR. WEIL: That is what I want to make clear by referring back to the transcript.

A Let me continue my answer.

Q You said at page 30 "I might say co-counsel for Mr. Bregman which is the firm of Weil, Lee & Bergin" and then you were asked who was the other counsel and you answered "me." You were then asked when did you become counsel. "Answer: On or about July 15, '73."

MR. WEIL: Obviously there was no such litigation in July of 1973.

A So, therefore, -- then I will put it on the record just to make it clear -- when I used the term

co-counsel in the previous testimony it was intended to mean only the fact that I have in the past, since or subsequent to July 15, 1973, acted as counsel for Dick Mr. Bregman on what you might call a personal basis in connection with certain matters and it was not intended to mean or imply that I ~~mean~~ are co-counsel with Dick the firm of Weil, Lee and Bergin in the pending litigation in connection with which this testimony is being given.

Q Yet you advised with them often about the pending litigation, did you not?

A No.

MR. WEIL: I will just enter an objection to the form of that question. The word "advised" is too vague and general.

Q You had several visits to their office during the course of the litigation, did you not?

MR. WEIL: I object to the word "several." I think he said he had about three.

A And only in connection with ~~my papers~~ appearance here as Dick a witness.

Q You testified that you had three -- first you said three or four visits to Mr. Weil's office. Then you said three before you were called as a witness.

meetings that I have had with Mr. Weil or his associate, Mr. Hafner, in their offices has been in connection with my testimony as a witness in this proceeding and those meetings took place beginning the fall or late summer of this year, early fall.

Q Are you admitted to practice in the U.S. Courts for the Southern District of New York?

A Yes.

Q Did you ever consider becoming a co-counsel of record in the litigation?

MR. WEIL: I object to the form of that question.

A I think I can answer it anyway. Whether it answers your question or not, let me say that the question of whether it would be desirable for me to represent Mr. Bregman in connection with any litigation between himself and NCK or Mr. Greene did come up and it was decided between myself and Mr. Bregman that it would not be desirable and inasmuch as Mr. Weil's firm had already been retained by Mr. Bregman to counsel him in connection with matters relating to the termination of his employment and given the fact that Mr. Weil and his firm have considerable expertise in litigation, it was decided that Mr. Weil's firm should represent

Mr. Bregman in connection with any such litigation.

Q Why wasn't it considered desirable that you should become co-counsel of record?

MR. WEIL: If any of this involves privileged communications --

A It is a privilege between myself and Mr. Bregman as to whether or not -- I think a discussion of whether or not I should represent him or he should use some other counsel is within the scope of the attorney-client privilege and has not been waived and I cannot waive it.

Q You never stopped representing Mr. Bregman, did you?

MR. WEIL: In what capacity, Mr. Bisco? I object to the form of the question unless you state in what capacity because the witness has carefully distinguished what he means by representing.

MR. BISCO: I think he can answer the question.

A I want to make it clear that I have -- to the extent that I have represented Mr. Bregman in regard to anything it has been at his express request and I could -- would say that at the present moment there

is no pending matter as to which I am representing Mr. Bregman. Whether that means that I have stopped representing Mr. Bregman, I will leave that to you to figure out.

Q Did Mr. Bregman ask you to stop representing him in any matter?

A No.

Q You had no qualms -- that is the very word you used, no qualms -- about representing him in his dealings with reference to the stock that he supposedly had under option from Mr. Greene. You had no qualms about it.

MR. WEIL: Again, I will make the same objection to the use of the word "qualms" and also with regard to the word "representing."

Q You may answer.

A Again, I will say Mr. Bregman from time to time during the period from -- certainly after July 15, 1973 up to about the end of 1973 called upon me from time to time for advice, legal advice, and counsel concerning various matters which I furnished to him. As I just testified there are no pending or outstanding matters as to which I am currently counseling Mr. Bregman on as attorney.

to September of 1967 we could figure out who was the Secretary then but I don't think it is very important.

Q Who is the Secretary now?

A I don't know.

Q In your capacity as general counsel, were you involved in the negotiations and representation of NCK in any ~~annual~~ or all matters?

A I would have to take issue with or question the phrase "any or all."

Q Let's say every --

A In any event, I conceived it to be my responsibility to maintain a management supervision over the legal affairs of the company. As I indicated previously this involved in many, many instances working with outside counsel. In any event, even in cases of transactions involving outside counsel, I certainly understood it to be my responsibility to see to it that the transaction, whatever it was, was properly handled from a legal standpoint.

Q Did you advise NCK in all of these matters?

A I advised the company where it was necessary to. To the extent that I required the assistance of other counsel in matters beyond my competence or beyond my ability to get the work done, I did so.

MR. BISCO: Just look at the index.

A The reference in the upper right-hand corner of Plaintiffs' Exhibit 27 or the notation I should say is simply a notation that corresponds to the tab number in this bound file where that -- where the signed original of that document was filed by me.

Q Referring you again to Plaintiffs' Exhibit 27, were you called upon or were you asked by anybody to render legal advice on behalf of NCK with regard to this document?

A No. Not to my recollection.

Q Were you called upon to represent NCK in a transaction which was the result of that or resulted from that document?

MR. BISCO: Isn't that the agreement signed by him?

MR. HAFNER: That's correct, it was signed by him.

MR. BISCO: What are you asking these questions for?

MR.HAFNER: I am asking him if he was called upon to represent --

MR. BISCO: He already testified that he made changes in it before signature and he signed

it and then we have them this morning that he saw it through in October.

MR.HAFNER: I understand what the testimony is.

Q Would you answer my question, please.

A As soon as Mr. Risco is through testifying, I can see what --

MR. BISCO: I am commenting.

A PLease read the pending question from Mr. Hafner.

(Question read)

A I did not represent NCK as counsel in connection with the transaction to which this Plaintiffs' Exhibit 27 relates.

Q In what capacity did you sign that document, Mr. Randall?

A As is indicated on page 5 of the document, I signed it and underneath my signature I wrote vice-president. I think it is already in the record.

Q I think you previously testified that Mr. Beresford was involved in this transaction?

A Yes. Mr. Beresford was involved to the extent of having some executive responsibility to carry it through.

Q Why didn't Mr. Beresford sign the document,

do you know?

A I think your question really is why did I sign it.

Q Why don't you answer the question I asked first and then you can answer the others.

A I think the question came up at some point as to who was going to sign on behalf of the company and my best recollection is that at that particular moment Mr. Beresford, whose office was next door to mine, was available. I am not sure who else was available and Mr. Beresford had a rather strange corporate title which had always given me some difficulty in terms of its legal significance because he was Chairman of a non-existent executive committee and to the best of my recollection, John said, "Maybe I should not sign this for the same reason that in times past you have suggested that I should not,"and I said, "Don't worry about it, John, I will sign it, because I am a vice-president of the company."

Q You wore several hats as vice-president. You testified to that, correct?

A I signed this document as vice-president, as an officer duly designated as such by the Board of Directors.

a copy of this document.

Q The copy of Plaintiffs' Exhibit 8 that I just showed you -- I am also handing you a copy of Plaintiffs' Exhibit 27 -- has a number of pink marks on it indicating, I believe, the apparent changes in those two documents. I would like you to look them over. Perhaps we can do it line by line and let's identify the changes and we will decide in your opinion precisely what the changes mean.

MR.BISCO: You want to know who made the changes or what they mean?

MR. HAFNER: We already know from your testimony that Mr. Randall made the changes. Off the record.

(Discussion off the record)

Q Mr. Randall, I have shown you these marked up copies of Plaintiffs' Exhibits 27 and 28. Your previous testimony indicates that you may have made the changes that are indicated. I would like you to describe for us the changes and in your opinion what the effect of those changes are?

A First of all, let me clarify my earlier testimony to the extent that I expressed any doubt about the changes that are reflected in Exhibit 27 which is the

successor in point of time to Exhibit 28. It was only because I could not be absolutely certain and I still cannot that one or another of these changes may have been made other than by me but let's say that in -- as far as the substantial number of these changes, I have no question that I in fact made them. So the record will be clear on that. As far as the specific changes which have been indicated on these two marked copies, I don't think it is necessary unless counsel on one side or another ~~examines~~ Grants on it that we go through this line by line and point out what these changes are.

MR. BISCO: You were asked a question, what was the effect of the changes.

A I am answering the question in my own way which is my prerogative until somebody tells me I cannot do it that way.

Q I asked a question and I believe Mr. Randall is responding to it.

MR. BISCO: I would like to know what the changes are.

A As I said before rather than attempt to go through this line by line, I think it is a fair characterization of the changes to say that they are either editorial,

they are you might even say in some situations aesthetic. They are not subject to someone pointing out something to the contrary -- they do not in any respect change nor were they intended to change the substance of the document, and I think if we were to go through these changes line by line we would see that they do not change the substance of the document. To illustrate that point, I would only or I would refer to the final paragraph of the document, numbered 2, in which the entire language is changed and there is virtually no word that is the same in the same place and yet the gist of those two paragraphs in my judgment is identical. It so happens that I sharpened up my editorial pencil, and I took some liberties with Plaintiffs' Exhibit 28 and made a lot of changes of that nature which I thought were improvements.

MR. BISCO: More aesthetic?

A Aesthetic. Editorial --

MR. BISCO: What do you mean by editorial?

A For the sense of clarity, consistency and all that. As I say --

MR. BISCO: Whatever the changes were, you made them personally?

A Yes. There is no question about that.

MR. BISCO: There are a number --

A With the sole qualification that there may have been a change that crept in here that I did not make which I cannot identify in the absence of somebody showing me my own marked copy in my handwriting which undoubtedly existed at one point, which has long ~~been~~ been since incinerated.

MR.BISCO: You made those changes out of your legal training and your aesthetic considerations.

A I don't know that my legal training had anything to do with it. I made the changes because I thought the language of the document as first written was not as clear and concise as it could be and, therefore, since I probably did not have anything else to do that afternoon, I decided to neaten it up a bit.

MR. BISCO: Did you get anybody's permission to do that?

A I don't recall that I even asked anyone's permission.

MR. BISCO: Were those changes that the agreements were finally signed, is that right?

A I believe so.

Q Again, Mr. Randall, those changes have no

substantive effect, to your knowledge,let's say?

A Certainly my knowledge and intention was not to change any of the substance of the document. As far as I know, no one has attempted to show that there was any substantive change between these two documents. If someone will call my attention to such a change, I will be very happy to talk about that.

Q Can you give us your opinion? Do you believe that there are any --

A I think I have already made it very clear that in my own mind, I did not make any change in the substance of these.

Q Did anyone ask you to make any substantive changes?

A No.

Q Mr. Randall, in your previous testimony at pages 62 and 63, you testified that you were involved in the Kaplan transaction to some degree. Would you describe for us the nature of your involvement in that transaction?

A I am sorry. You referred me to --

Q Perhaps the word involved is not in that portion of the transcript but I believe that is the substance of your prior testimony.

A Let's say this without regard to the accuracy of the reference to the previous testimony. I think I have testified at some point or another that I was "involved" to a degree with the Kaplan transaction and I think that the extent of that involvement is to a very considerable extent or to a degree indicated in my testimony earlier today concerning the follow-up on the transactions involving Mr. Myers and Mr. Roncarelli and Mr. Maas and Mr. Beresford although I don't believe there was very much follow-up involved in that since Mr. Beresford was ~~not~~ physically present and did not raise any objections. There is no question, as indicated in the testimony within the past few minutes, that I was involved to the extent of having marked up Mr. Winkler's draft as represented by Plaintiffs' Exhibit 28 to the extent that is reflected in or substantially reflected in Plaintiffs' Exhibit 27. I guess I was further involved -- I was certainly involved in the early discussion of the transaction or I should say I was present when the first discussion took place at least among the general executive group of NCK. I think I have testified as to that meeting. I was involved to the extent that I subsequently put together a collection of the papers

so that they would be available for further reference and placed in the office safe for safekeeping, I was involved in bringing the various documents in a formal way before the meeting of the Board of Directors so they would be confirmed. This catalog is virtually complete. I suppose the only other area in which I was involved was that it was -- it came or it fell to my lot to transport certain ~~principally~~ negotiable instruments, i.e., checks, to Mr. Kaplan's lawyer on or about August 31st and to deliver them against delivery of Mr. Kaplan's shares. To the best of my recollection that is the extent of my involvement and if you want me to try to characterize that involvement, it was --

MR. BISCO: I don't think you were asked to characterize it.

A I will characterize it anyway. It was ministerial. I was an errand boy.

Q Did you act as an attorney with regard to that transaction for NCK now?

MR. BISCO: He can answer it if he wants but I object to the form.

A I think I have stated on the record before that it was my very clear understanding that I was not called

upon -- not being called upon and I was not called upon to function as counsel for NCK in connection with this transaction.

Q Mr. Weil referred me to the correct page in your previous testimony, that being page 25 on the subject of your involvement with this transaction, page 25 line 19. Mr. Randall, there has been previous testimony by you that you had no qualms as to the propriety of your being Mr. Bregman's personal attorney notwithstanding the fact that you were previously employed as house counsel by NCK. To your knowledge, was there anything that you knew with regard to these transactions that Wally was either not entitled to learn or have access to or did in fact know as president of NCK?

MR. BISCO: Of course, that is not exactly the questions that were put to him. It was not only that he was house counsel but that he worked on the very transaction in which he took the opposite side after termination of his employment.

Q Would you answer my question, please, Mr. Randall?

A I think actually you have asked me several questions and I think I will take the -- ~~yes for~~ me

the most straightforward route which is that as far as the transactions involved in this litigation there is no information that I had, have or had access to that Mr. Bregman did not in fact know. It is not even necessary to go beyond that to the question of his entitlement to know as an officer and director of the company.

MR. BISCO: Off the record.

(Discussion off the record)

Q Mr. Randall, could you tell when your first contact with Mr. Weil was or the firm of Weil, Lee & Bergin although I realize you previously testified to that. Please restate it for us.

A I think that in the previous testimony we pinned that down to a fairly narrow time span.

MR. BISCO: Off the record.

(Discussion off the record)

Q Mr. Randall, isn't it true that you first spoke to Mr. Weil by telephone on October 16, 1973?

A It is the fact that my first communication with Mr. Weil at least in the context of this matter was by telephone and while I cannot vouch for it personally because I don't have a record of it, I think October 16th would be an accurate date.

Q Do you know where you were?

A The telephone conversation took place between me on the telephone at my home and Mr. Weil who was at the time out-of-town on whatever he was out-of-town on. He was in Toronto, I think.

MR. WEIL: Montreal.

Q Did Mr. Weil express any opinion or concern about your previous employment as counsel to NCK?

A I would not characterize or I would not necessarily characterize it with one of those words or another.

Q Characterize it as you please.

A However, one of the subjects that was discussed in that conversation on the telephone was whether there was any question in my mind or to put it a different way had I thought about the question of the propriety of my representing Mr. Bregman in connection with matters that necessarily involved my previous employer, and the upshot of that discussion was that I had thought about it and that I felt that under all the circumstances and given the subject matter of the -- or given the subject matter as to which I was being asked for advice and counsel, I had no problem with it.

Q Who was asking you for advice and counsel?

A Mr. Bregman.

MR. BISCO: Would you mind asking him who telephoned who?

MR. WEIL: If you want, I will state it for the record. I telephoned. I was in Montreal and I put the call through to Mr. Randall.

Q. You are saying that Mr. Weil asked you if you had any concern about representing Mr. Bregman in any capacity with regard to conflict or confidentiality, is that correct?

A I don't think that -- I would prefer to characterize it my own way, if I may.

Q Fine. As I testified just now Mr. Weil asked me the question...

Q. Was it substantially the question I just asked?

A No, it was not because it was not a question of -- you used the word concern and I have already testified that I had thought about the question, and therefore, it was something that I had concerned myself with. Depending on -- you can define concern any way you want. I had thought about it. I had come to the conclusion, which I then expressed to Mr. Weil, that given the circumstances and given the nature of the matters

involved, I felt that I had no -- that there was no ethical or legal obstacle to my representing Mr. Bregman in connection with these matters certainly as the situation then existed.

MR. BISCO: I don't know if he fully answered the question. He said he proposed to answer the question in his own way. Have you fully answered the question as to the conversation with Mr. Weil? Do you want to add anything?

MR. WEIL: Do you want to have your answer read back?

A Why don't you read back the answer and we will put it to a vote.

MR. BISCO: No. You are going to make the vote.

(Record read)

MR. BISCO: Is that a ~~moot~~ incomplete answer?

A I think so.

Q Mr. Randall, I am going to give you or hand you the documents that were marked previously, that is, Plaintiffs' Exhibits 34 through 40 inclusive and my questions as to all of them will be the same. So maybe I will just ask the question as one question and if there is any difference as to the documents, you can

differentiate in your answer. Were you called upon by anyone to act as an attorney with regard to any of these documents or the transactions underlying them?

MR. BISCO: Note my objection as to the form, calling for a conclusion.

A Maybe it will be helpful if I try, subject to anyone's later objection, to characterize this group of documents. As I see them, they all relate to the matter of the agreements between certain individuals and NCK relating to certain shares of stock that they had or in all cases that they had purchased from Mr. Kaplan. It seems to me that there are two aspects here. One is from the standpoint of the company it was a prerequisite in order to conclude these transactions that these various agreements be signed. To that extent, the agreements having already been prepared and submitted to the individuals for signature, in my judgment there was no legal aspect to -- remaining to be handled. This was a ministerial -- administrative process of getting the various documents signed. The other aspect that runs through these documents is that, to a limited extent, I was acting on behalf of the individuals in transmitting their payment for the shares they were buying to Mr. Kaplan's attorney in

return for which certain shares of certificates were delivered to me which I kept in my custody pending receipt of the agreements and again I never considered that I was representing any of these people in a lawyer's capacity but rather simply handling an administrative detail because it was more convenient for me to do it than to have them do it individually. To the extent that you asked whether I was called upon to give any advice or counsel, I guess my answer is that I find it very difficult to ~~concede~~ conceive that there was even any occasion for me to do so and in any event I did not.

Q Did you negotiate with regard to any of these documents on behalf of NCK as an attorney?

A No.

Q Mr. Randall, would you please take a look at Plaintiffs' Exhibits 38A and 38B, those being memoranda to Roncarelli to you and from Mr. Norman to you.

A Memoranda from -- these two documents are memoranda both dated October 18, 1972, Exhibit 38A is a memo from me to Mr. Roncarelli. Exhibit 38B is a memo from me to Mr. Norman.

Q Each of those documents refers to a

memorandum by Mr. Norman, does it not?

A No.

Q Do either of them refer to such a memorandum?

A Exhibit 38A refers to a memorandum from Mr. Norman to Mr. Roncarelli.

MR. BISCO: Is that the one that wasn't put in evidence that I gave you a copy of?

MR. HAFNER: We are going to that.

A I am sorry. It does appear that Exhibit 38B refers also to a memorandum from Mr. Norman although 38B does not make it clear to whom it was sent.

MR. HAFNER: Can we mark as Defendant's Exhibit 11 for identification this memorandum from Mr. Norman to Mr. Randall with copies to Roncarelli and Winkler dated October 17, 1972.

(Memorandum dated October 17, 1972 marked Defendant's Exhibit 11 for identification, this date.)

Q Mr. Randall, does this document that you are holding now, Defendant's Exhibit 11, in any fashion ask you for legal advice regarding the transactions?

MR. BISCO: I would object to the form because the document speaks for itself and the question calls for the witness' conclusion.

A Subject to Mr. Bisco's objection, which has been noted, first of all let me point out that Defendant's Exhibit 11, which has just been marked for identification, refers by its terms to --

MR. BISCO: I withdraw the question, Mr. Randall.

Q Is Defendant's Exhibit 11 the memorandum referred to in Plaintiffs' Exhibit 38A and B?

A Let me turn it around. Both Exhibits 38A and 38B refer to, among other things, the memo that has been marked as Defendant's Exhibit 11.

Q Mr. Randall, looking at Defendant's Exhibit 11 in your opinion, does that document ask for legal advice?

MR. BISCO: Same objection.

A Once again, subject to the objection, I find no language in Mr. Norman's memorandum nor, I am sure, did I at the time find any language that indicated that Mr. Norman was asking my opinion on anything. The gist of the memo, which speaks for itself, is that Mr. Norman was giving me information.

Q Mr. Randall, were you retained by Mr. Breg-man or Mr. Weil or the firm of Weil, Lee & Bergin as co-counsel in this action?

A No.

Q Were you engaged to represent Mr. Bregman in this action?

A No.

Q Do you have any responsibilities for the strategy or handling of this lawsuit?

A No.

Q Mr. Randall, I am showing you Plaintiffs' Exhibit 41. I refer you to Exhibit 41B. Was there anything, to your knowledge, in the bylaws of NCK Organization which would require the ratification of these various documents listed there on Plaintiffs' Exhibit 41B before they became effective?

A No. Not to my knowledge or recollection.

MR. BISCO: Do you mind if the question is repeated?

MR. HAFNER: Sure.

(Record read)

MR. HAFNER: I have no further questions.

EXAMINATION BY

MR. BISCO:

Q Mr. Randall, in preparing to testify, you said before that you read the depositions of Mr. Bregman and Mr. Norman. Did you not?

A Correct.

Q Did you notice in Mr. Bregman's testimony that he testified at page 26 when asked whether it was his opinion that he could buy the shares under the Greene option for $5.47 a share and immediately tender them to the company at present book value. "I sure did not say anything about it."

"Question: You kept it to yourself?"

"Answer: I sure did."

You testified that you did not advise Mr. Bregman on this subject until October 1973 at which time you though he had a right to exercise the Greene option and tender the shares at present book value but that the question was not finally decided whether he would do so. Did you not?

A I think that is substantially an accurate statement of my earlier testimony but I would reserve whatever -- make whatever reservation is necessary. What I said then, I will testify again. If you want to go back and look at the transcript, fine.

Q No.

A I think that is essentially what happened.

Q Mr. Bregman testified that he sure knew that he could buy the stock under the option and

BEST COPY AVAILABLE

immediately tender it at present book value. He knew that at the time that he got the option. Do you know what that knowledge is based on, what that opinion of his is based on?

A I haven't any idea.

Q Then at page 27, he testified that he thought that anyone, that is, all the others who bought Kaplan stock, had the same right because the deal was "self-triggering" without regard to the established Stockholders' Agreements." You saw that, didn't you?

A I have read and I am now reading again Mr. Bregman's testimony at page 27.

Q He so testified, did he not?

A You have paraphrased. What he said was what it says at lines 23, 24 and 25. I assume those are the lines you are referring to.

Q You do not want to correct what I said, do you?

A You have interpolated references to Stockholders' Agreement which do not appear in the section of the transcript that I am reading. You have telescoped some testimony which may or may not be an accurate way of characterizing Mr. Bregman's testimony but I am not going to subscribe it to one way or the other. Mr.

Bregman testified as to what he testified.

Q Mr. Bregman testified that he thought that the deal was self-triggering. He did say that, didn't he?

A I see those words on line 23 on page 27.

Q Do you know what his opinion was based on in that regard?

A I don't even know what he means by self-triggering.

Q Then he testified at page 28 that sometime later he told Messrs. Myers and Roncarelli that they each had the right to quit and exercise the Greene option. You see that don't you?

A Are you referring to lines 11, 12, 13 on page 28?

Q Let's say lines 5 to 19.

A You are talking about Mr. Bregman's testimony?

Q Mr. Bregman's testimony, yes.

A Mr. Bregman's testimony on this point as I see it reads "I think we all have the right to quit and exercise the Greene options."

Q That is what he told Myers and Roncarelli, isn't that right?

A As far as I am aware that is still true. It always was true as far as that statement goes.

Q Whatever Mr. Bregman said, and we will let the court determine what it means, he then says at the bottom of page 28 when asked whether he based his opinion expressed to Messrs. Myers and Roncarelli on any advice that you received from anyone.

"Answer: Yes, I had asked Don Randall about it."

"Question: When?"

"Answer: It would have to be after July 1st of '73. So it was probably in the month of July 1973."

"Question: What did you ask him?"

"Answer: I asked him if I could exercise my Greene options after resignation or just prior to resignation because I was planning to resign."

"Question: What did he say?"

"Answer: He said as far as he could tell the Greene options were outside the bounds of any agreement that I had."

A You did not read his whole answer. Let's read the rest of his answer.

Q All right. We will read the rest of it.

"I did not ask Mr. Roncarelli or Myers because they

were not paying him." Are you satisfied with that?

Did you so advise him?

A I have already testified --

Q I am giving you a final chance. I understood you wanted to correct that.

A I have already testified in my previous testimony that on or about October -- early October, somewhere between the third and the eighth or thereabouts, that I advised Mr. Bregman in the presence of Mr. Myers that he in my judgment at least had an arguable right to exercise the Greene options and then to put the shares back to the company at their current book value. I think that is an accurate summary of my testimony on that.

Q Even prior --

MR. WEIL: I don't think that is the question that Mr. Bisco was asking you. He was asking you about Mr. Bregman's testimony that you gave him certain advice in connection with what his rights would be with respect to the Greene options in July of that year, if he resigned.

MR. BISCO: That is right.

Q Did Mr. Bregman ask you what the consequence would be if he resigned?

A Yes.

Q What did you tell him?

A With regard to the Greene options, I gave him advice at that time.

Q I know. What was the advice?

A It seems to me that since it was been raised this would be the appropriate time --

MR. WEIL: We have agreed there is no privilege on that.

A There is ~~no~~ documentary evidence, if you will, which I think is the most appropriate way to get this on the record.

Q Would you mind giving your advice of whether he could exercise --

A I gave him the same advice that I subsequently -- no. I am sorry. I did not give him the same advice. I am sorry.

Q What did you advise him?

A I advised him that -- and here again I would have to refresh my recollection --

Q From what?

A Because there is a written memorandum in existence as to advice I gave him on this question.

Q Where is it?

A I keep volunteering it to you.

MR. WEIL: Off the record.

(Discussion off the record)

MR .WEIL: What happened, Mr. Bisco, is that Mr. Bregman gave a list of handwritten questions to Mr. Randall asking where he would stand with respect to various matters if he resigned. One of the questions involved the stock including the Greene option and then Mr. Randall supplied a handwritten memorandum answering each of those questions. We agree that insofar as the Green option subject matter is concerned, there is no longer any privilege but there were other matters involved in this list of questions and list of answers giving advice as to which the privilege has not been waived and we will supply you that portion of Mr. Bregman's written questions and have Mr. Randall's written answers that deals with the Greene options.

MR. BISCO: Just tell me this, please. Why is the other matter privileged? I don't want to know what it is but why is it privileged?

MR. WEIL: It deals with different subject matter which Mr. Bregman did not testify to and

were not discussed in front of Mr. Meyers. We can tell the subject matter without waiving the privilege.

MR. BISCO: Tell me the subject matter.

A Stock other than the Greene option, profit sharing, maybe is malreimbursement --

MR. WEIL: Several of the things that were in his letter to you, as a matter of fact.

A The club membership may have been one of those things because of course there was a club membership that he had in the company's name. There was the car.

Q What was the date of these questions and answers?

A These questions were in the handwritten memo which may or may not have been dated. It was handed to me on or about July 16th, 17th, 18th, shortly after my employment terminated and whereupon, Mr. Bregman said if you are agreeable, you know, I would like some -- your advice on some of these questions because I think -- and I am quoting Mr. Bregman more or less -- "I think my days at NCK may be numbered or at least I am seriously considering the possibility of getting out, and, therefore, if I decide to do that, I will want to do it in the most intelligent manner." So, therefore,

these questions were -- went more to questions of timing than anything else or as much to that --

Q Did you answer the questions in writing?

A I did.

Q Did you date your own memo?

A I may or may not have. In any event, it would have been dated.

Q You say now it was in July?

A I know it was in July. I can reconstruct the circumstances quite clearly.

Q You say now, because you said it was not until October that he consulted you.

MR. WEIL: In your earlier testimony.

A In the first time around, yes. I had ~~immediately~~ completely forgotten and it was not until Mr. Weil called to my attention that there was already in the papers that Mr. Weil had received from Mr. Bregman copies of these documents. Whereupon, I said sure, I remember that.

Q Mr. Weil received the questions and answers from Mr. Bregman?

A Yes.

Q When Mr. Weil telephoned you on October 16th, what did he say to you to introduce himself or

whatever?

A I don't think it was necessary for him to introduce himself. First of all, Gil and I had met at least once, possibly more, on a handshake basis amist the legal fraternities.

Q Did you know at that time that he was in the Bregman case?

A I believe to the best of my ability to reconstruct it that I had gotten a call from Walter and discussed with Walter Bregman the desirability of Walter's retaining other counsel subsequent to his being terminated because it looked to him, Mr. Bregman, as though there would be some dealings that would become necessary on his behalf if nothing else, awkward for me to handle personally. That is as much as a reason as anything. So, therefore, to the best of my recollection, probably within 24 or 48 hours prior to Mr. Weil's call, I either had a telephone discussion with Mr. Bregman, or talked to him possibly face-to-face, in which he said I have talked to Gil Weil whom you know and he has agreed to represent me in connection with these matters as necessary.

Q You said you went to see Mr. Weil with Mr. Bregman.

A That was later. That was after October --

Q Was that later? Your first contact in this case with Mr. Weil was his telephone call of October 16th?

A My first communication.

Q How much later did you visit his office?

A I would say it was within a week. It may have been a week. It might have been three weeks but it was within that time frame.

Q You said at one time there were three or four visits prior to your testimony here and then you said you do not think there were more than three visits. In what months were they? We have first October 1973. What else?

A They would have been October, maybe a couple of visits in -- one or more, one or two, in November, maybe early December. My best recollection is that those meetings, whether they were three, four, were during a period between say late October, possibly early November and the end of the year, December 31, 1973.

Q Then you have had a number of visits with him in connection with your testimony on the deposition?

A Right, beginning sometime around September.

Q Several visits?

A I would say certainly that many times I have been testifying. This is my third day. So on each of those occasions I have gone to Mr. Weil's office if only just to get a free cab ride.

Q When Mr. Weil telephoned you on October 16th, he discussed your having formerly having been house counsel for NCK?

A Right.

Q I think you said that you told him that you had some concern about that but that you had satisfied yourself that you could represent Mr. Bregman personally against the company. Do I correctly describe your testimony?

A Not quite. First of all, I said I had concerned myself with it which is perhaps a little different from saying that I was concerned about it.

Q You had no concern about it?

A No. I said I had concerned myself. I thought about it. If thought is a better word, let's use that. I had thought about the subject. It was not that I was oblivious to the possibility of this being -- of the question being raised. So, therefore, I had thought about it. As I previously testified

that I satisfied myself and so advised Mr. Weil that I did not think that there was a problem.

Q Before you testified that Mr. Bregman being a very shrewd gentleman waited until your employment was over and then he consulted you and you had no qualms, I am quoting you, qualms, about representing him against the company, is that correct?

A Right.

Q Do you want to change that testimony?

A No.

Q How did you satisfy yourself that your qualms were justified, that you were justified in representing him? How did you satisfy yourself?

A I think you are asking me now for some kind of legal conclusion.

Q Yes, I am.

A I don't think that that is a proper subject matter at this point. It is argumentative.

Q You are not the counsel in this case, I don't think and you should not be raising objections. You do not hear other counsel doing it. Can you answer that question that I have asked you?

A I certainly can answer it. My question is whether I am going to answer it.

Q Then we are going to ask for a ruling.

A The answer I will give you is I considered first of all the matters in question and these matters were fairly easy to identify because these were the matters enumerated on the list that Mr. Bregman had given me and then I considered the relationship of myself, my previous relationship to the company, Mr. Bregman's previous, and continuing at that time, relationship to the company, in particular with regard to his knowledge of the transactions involved and to the fact that he was a director of the company and consequently privy to the ~~virtual~~ total information that I was privy to, ~~if not,~~ and a great deal more in many areas, of course. On the basis of an evaluation of those circumstances, I concluded that there was no problem. Therefore, I had no qualms. If that is the answer you are looking for --

Q In the August 31st, 1972 transaction to close with the Kaplan purchase, you went to Mr. Hart's office, didn't you?

A Mr. Hart?

Q Hart is the counsel for David Kaplan?

A Yes.

Q In addition to the papers that we showed

you and discussed this morning you raised the question, did you not, about whether a higher New York State stamp tax was payable than the $500 which David Kaplan paid?

A Let me say that the question came up but it did not come up quite in that way. What happened to the best of my recollection, which I think is fairly accurate on this point, in that Mr. Hart, when it came time Dun to settle up for the New York State New York transfer tax that would be payable with respect to the transfer of the Kaplan shares out of Mr. Kaplan's name and into the hands of -- into the hands of the purchasers, advised me that he -- on the basis of his own research or somebody else's at any rate -- he had concluded that this transaction came within a limitation which then and perhaps now still exists in the applicable New York stock transfer tax law which limit the tax payable on an individual transaction to a total of $500. At the price of $5.47 a share, and this in turn I believe brought the shares into a bracket of two and a half cents a share of tax or something like that, t there were a hundred and fifty odd thousand shares involved and so, therefore, two and a half cents by my calculations -- maybe it was

more than -- in any event, the applicable tax if it were calculated simply by multiplying the per share tax by the number of shares would have considerably exceeded $500.

Q You suggested indemnity?

A Mr. Hart took the position that this provision was applicable.

Q I am trying to shorten this, if you do not mind.

A I said, okay, I don't see that that is free from doubt. I think that the company ought to have some protection in this matter.

Q Mr. Hart agreed that Mr. Kaplan would give you indemnity?

A Right.

Q You prepared the indemnity agreement?

A Yes.

Q You sent it to Mr. Hart to get it signed by Mr. Kaplan?

A Right.

MR. BISCO: I offer for identification the letter, copy of a letter, of -- well have you identified it.

Q That is the letter and the indemnity

agreement, isn't it?

MR. WEIL: Your question, is it applicable to both sheets?

MR. BISCO: Yes, the letter and the indemnity agreement.

(Letter and indemnity agreement marked Defendant's Exhibit No. 12 for identification, this date.)

Q After some follow-up later in the year, you did receive the indemnity that you had prepared for Mr. Kaplan's signature, did you not?

A My best recollection is that it wasn't actually received.

Q The follow-up was by you with Mr. Hart and Mr. Kaplan?

A Whether it was -- I know I followed up with Mr. Hart and I think it is entirely possible that I may have at some point followed up directly with Mr. Kaplan.

Q Referring to Exhibit 30A for identification and item 8 on that, is this agreement, which I now show you and which is marked in the right in Mr. Winkler's handwriting, 8 redrawn, is this number 8 referred to in that letter?

MR. HAFNER: Off the record.

Deposition of Walter W. Bregman

Q Then you thought that you had an advantage through the options, and that the others had the same advantage?

A Yes, and in fact I said this to them some five or six months later.

Q You did?

A Yes.

Q To whom?

A Myers, Roncarelli.

Q You told them you had the right?

A I said, "I think we all have the right to quit and exercise the Greene options."

Q And you paid no attention to the fact that the standard stockholder agreements provide for a holding of thirty-six months?

A Not in my conversations with them.

Q Did they agree with you?

A They seemed very pleased.

Q Did you base that on any advice that you had received from anyone?

A Yes, I had asked Don Randall about it.

Q When?

A It would have to be after July 1 of 1973, so it was probably in the month of July 1973.

Q What did you ask him?

A I asked him if I could exercise my Greene options after resignation, or just prior to resignation, because I was planning to resign.

Q What did he say?

A He said as far as he could tell, the Greene options were outside the bounds of any agreement that I had.

I didn't ask him as to Roncarelli or Myers, because they were not paying him.

Q Were you?

A Yes.

Q You were paying him fees at this time?

A After he was severed from NCK.

Q Let's find out about Don Randall. Who was Don Randall.

A He was the internal counsel, I guess, at NCK.

Q He was a lawyer?

A Yes, he is a lawyer.

Q He was employed at that time by NCK?

A No, he was not. You mean when he was working with me?

Q Yes.

A No, he was not.

Q He is the man that prepared that June 17, 1970 contract, didn't he?

A Yes, everyone's else's contract in the company.

Q He was house counsel, I think you might say?

A That is right.

Q When did he retire or when was his employment terminated, might be more accurate?

A July 1, 1973.

Q Had you used him as counsel before then?

A No.

Q But you had consulted with him, had you not?

A As president of the company I consulted with him.

Q You did not consult with him before that time about your problems?

A No, never.

Q When he left the company in July '73, you used him as your personal counsel?

A In a couple of matters.

Q And you paid him for that?

A I have not paid him yet because he has not

billed me.

Q But you intend to pay him?

A If he bills me, I will. If he does not, I won't.

Q So Mr. Randall advised you after he left the company on July 1, 1973, that you had a right to, as far as he could see, to acquire the Greene stock on option and tender it to the company for an immediate quick profit, is that right?

A For an immediate profit.

Q When was your employment terminated?

A October 2, 1973.

Q You got a letter from Norman, didn't you?

A I did.

Q October 2, 1973 -- is this a copy of the letter we are referring to?

A Yes.

MR. BISCO: I will offer this as Plaintiffs' Exhibit 4 for identification.

(Document referred to above marked as Plaintiffs' Exhibit 4 for identification.)

Q To come back to August '72 when the option was spoken of, you had a talk with Norman about that. Was that in person or over the telephone?

Plaintiffs' Exhibit 11 for identification.)

Q After the Kaplan deal was consummated, let's say September 1972, did you have any communication with David Kaplan?

A Between then and now?

Q Yes.

A Sure.

Q Anything about this?

A Not to my knowledge.

Q Do you know whether Randall did?

A I have no knowledge of what Randall did or didn't do.

Q If at the time you were given the Greene option, Mr. Norman or anyone else had said to you, "You cannot sell this stock to the company at a profit unless you hold it for thirty-six months," would you have accepted the option?

A You are asking for a conjecture. Sure. I never turn anything down. I keep my options open.

Q Why didn't you buy the stock if you felt you could sell it immediately to the company at a profit?

A The Kaplan stock?

Q Yes.

A In the first place, I didn't have the money, because I was loaned up to a very high level at that point; and the second place, I had very, very serious reservations about th ompany's future at that time and I had very little faith in Mr. Norman.

Q Your doubts about the company were so serious that you wouldn't even take stock at approximately half the value you could get for it?

A That is correct. At that point we had not consummated the loan with the Chase Manhattan Bank.

Q You had the loan on the Chemical Bank, didn't you?

A Which had been called, loan from Mr. Kleindienst to Mr. Norman.

MR. BISCO: Off the record.

(Discussion off the record.)

Q You say you used Randall as your lawyer after he left NCK. When did you employ Mr. Weil's firm?

A I would say this is a matter of record, but I would say it was about the second week in October or first week in October.

MR. WEIL: May we go off the record for a moment?

MR. BISCO: Yes.

(Discussion off the record.)

THE WITNESS: Shortly after the October 8 letter and prior to your response.

Q Donald Randall was your neighbor in Connecticut, wasn't he?

A Yes.

Q And you used to drive with him when conditions permitted every day?

A With Tom Myers.

Q And I suppose Mr. Randall was informing you from time to time of things going on?

A We talked business. I don't think he violated any confidences any more than we did. He was an employee of mine.

Q For the company?

A He was an employee of mine, for NCK, Inc., as was Myers. Later he went into Org.

Q You mean "mine" as distinguished from the "company"?

A No, his direct reporting relationship was to me.

Q On August 25, 1972, Mr. Winkler wrote a letter to Mr. Randall, of which I show you a copy. Did Mr. Randall show you that, or the documents

enclosed therein?

A I have never seen this before.

Q Read it please.

Did he show you the papers that were being filed with Miss Flanagan on the Kaplan-Greene deal?

A No.

Q Did he show you the proposed No. 8 in this letter, proposed amendment to the standard stockholders' agreement relating to the purchase by executives of Kaplan stock, either directly or through the exercise of Greene options?

A No.

Q You knew nothing about that?

A Not a thing.

Q You just thought you had a secret advantage?

A I didn't think it was secret. I thought the other people had the same deal I had.

Q Did you believe Norman believed it?

A I didn't think Norman believed it.

Q The reason that you thought the other people believed it was that Randall told you?

A Yes, he told me in July '73, yes.

Service of three (3) copies of the within
is admitted this 16th day of April 1976

Bass Winkler & Higginbotham MR
Attorneys for Plaintiffs-Appellees